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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, PACIFIC SOUTHWEST REGIONAL OFFICE, *Peiitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and TRANS AMERICA BROADCASTING CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on September 30, 1968.

OPINIONS BELOW

The opinion of the court of appeals is reported at 403 F.2d 169 (App. II, *infra*, pp. 2a-12a). The memorandum opinion of the Federal Communications Commission (App. III, *infra*, pp. 13a-66a) and the agency's memorandum opinion and order denying reconsideration (App. V, *infra*, pp. 69a-95a) are reported at 4 F.C.C. 2d 190 and 6 F.C.C. 2d 385, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1968 (App. I, *infra*, p. 1a). By order dated December 17, 1968, Mr. Justice Black extended the time for filing the petition for certiorari to and including January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The fairness doctrine of the Federal Communications Commission imposes upon broadcast licensees an affirmative duty to air varying viewpoints on controversial public issues. The Commission's standard of licensee responsibility requires broadcast licensees to exercise supervision and control over all material disseminated through their facilities and to make programming judgments reasonably related to the public interest. Respondent Trans America Broadcasting Corporation (the licensee of Radio Station KTYM) knowingly or recklessly and irresponsibly allowed the recurrent broadcast over KTYM's facilities of false and defamatory appeals to anti-Semitic prejudice, and it did not seek out exponents of or broadcast opposing viewpoints. Only after petitioner had complained about the false and defamatory, anti-Semitic content

of the broadcasts did the licensee even offer reply time on behalf of the maligned group and individual. The Commission, upon respondent's application, automatically renewed KTYM's broadcast license without a hearing. The agency and the court of appeals concluded that the licensee's offer of reply time fully satisfied, as a matter of law, its public service obligations under the fairness doctrine and the standard of licensee responsibility, ruling that the licensee's First Amendment right of free speech precluded the Commission from holding a hearing to determine whether, in view of the licensee's past programming decisions, the public interest would be served by a grant of its renewal application. The following question is presented:

Is the Commission, in applying its fairness doctrine and standard of licensee responsibility in the above circumstances, precluded by the First Amendment from holding a hearing to determine whether a broadcast licensee has adequately performed his duty to serve the public interest?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in App. VI, *infra*, pp. 95a-96a.

STATEMENT

This is a petition for certiorari from a judgment of the court of appeals affirming orders by which the Federal Communications Commission granted, without a hearing, the application of Trans America Broadcasting Corporation for renewal of the radio broadcast license of Station KTYM. Petitioner filed pleadings with the Commission opposing an automatic grant of

the application and requesting that a hearing be held to determine whether renewal of KTYM's license would serve the public interest in view of the licensee's continuing disregard of its responsibility for the content of programs broadcast over its facilities and its recurrent violation of its obligation, under the fairness doctrine, to air varying viewpoints on controversial public issues. The Commission, with Commissioner Cox dissenting, ruled that the First Amendment's guarantee of free speech precluded it from holding the requested hearing, and the court of appeals affirmed the agency's decision.

(1) The Commission's Fairness Doctrine and Standard of Licensee Responsibility for Programming

In implementation of its statutory duty to protect the public interest in radio broadcasting, the Commission has promulgated the fairness doctrine and the standard of licensee responsibility for the content of programs broadcast over the licensee's facilities. There is no dispute in this case as to the obligations those pronouncements impose upon broadcast licensees. The Commission stated in *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1251 (1949), that under the fairness doctrine:

> "[B]roadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, *over and beyond their obligation to make available on demand opportunities for the expression of opposing views.* It is clear that any approximation of fairness in the presentation of any controversy will be difficulty [*sic*] if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about

balanced presentation of the opposing viewpoints." [Emphasis added.]

In its brief in the court below, the Commission reaffirmed this duty (see Brief for Appellee, pp. 20-21). See also, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F.R. 10415 (FCC, 1964).

In the same brief (pp. 16-17), the Commission acknowledged that "licensee responsibility is a keystone of the regulatory scheme." And it has long been settled that a responsible licensee is one who has exercised "[c]omplete supervision of and control over programs, including careful examination of their content" (*United States Broadcasting Corp.,* 2 F.C.C. 208, 225 (1935)), and "has made programming judgments reasonably related to the public interest" (*Pacifica Foundation,* 36 F.C.C. 147, 149 (1964)).

(2) Description of Petitioner

Petitioner is Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office ("ADL"). B'nai B'rith is the oldest and largest national Jewish organization, having been founded in 1843. ADL carries on the educational work of B'nai B'rith, functioning through regional offices around the country. The coverage of the Pacific Southwest Regional Office includes the service area of Radio Station KTYM. (R. 395.)[1]

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[1] "R. —" references are to the certified record of the proceedings before the Commission. "J.A. —" references are to those portions of the record contained in the joint appendix filed with the court of appeals.

(3) Description of KTYM

Station KTYM is licensed to respondent Trans America Broadcasting Corporation, all of whose stock is owned by Mr. A. J. Williams. KTYM is licensed to serve Inglewood, California, part of the Los Angeles metropolitan district. (R. 1, 10.) One of the regular programs broadcast by KTYM is entitled "Richard Cotten's Conservative Viewpoint."[2]

(4) The Cotten Broadcasts

Petitioner became interested in KTYM's service when Jewish residents in the station's service area complained to it about a Cotten broadcast of October 7, 1964 (R. 154). That broadcast, as the court of appeals recognized, had woven through it innuendo and insinuation "equating Judaism with Socialism and Socialism with Communism" (App. II, *infra,* p. 32a).[3] The broadcast also contained an unfair, virulent and defamatory attack on ADL and one of its officials. Cotten charged that ADL General Counsel, Arnold Forster, had been a Communist spy (quoting from a letter by Joseph P. Kamp read into the Congressional Record by Representative Clare E. Hoffman) (App. III, *infra,* pp. 44a-45a):

> "If you can get President Truman to let you look at the FBI files, you will discover that Forster's right name is Fastenburg and that he was a member of the Communist spy ring."

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[2] This is a sponsored program for which the station receives payment. It is 15 minutes in length and is broadcast five days a week. (J.A. 19.)

[3] The transcript of the October 7, 1964, broadcast is reprinted as part of Commissioner Cox's dissenting statement, App. III, *infra,* pp. 42a-48a.

As support for his equating Judaism and Communism, Cotten alluded to the following quotations allegedly appearing in two publications—" 'Scratch a professional anti-Communist and you will find an anti-Semite' " and " 'Anti-Communism is anti-Semitism' " —and concluded (*id.* at 43a):

> "Now, I have probably never brought you any single message more important than the preceding. 'Anti-Communism is anti-Semitism' and 'Scratch a professional anti-Communist and you will find an anti-Semite.' Where do we go from here? Do we bow our necks because of the smear or do we do the best we can to expose those who would subvert our Constitution, our way of life and trust the facts can stand on their own two feet? I know not what course you choose to follow, but for me, I choose the latter."

To further support his thesis that Judaism and Communism are one, Cotten asserted (*id.* at 47a):

> "It was the eminent authority, Rabbi Stephen Wise, founder of the . . . powerful political American Jewish Congress in 1935 who said 'Some call it Marxism but I call it Judaism.' "

Cotten, in a series of broadcasts on January 6, 7, and 8, 1965, levied another attack on ADL, American Jewish Congress and the Jewish community.[4] He again dredged up the Rabbi Wise canard and the anti-Communism is anti-Semitism quotations (App. III, *infra*, pp. 53a, 55a) and, continuing, said (*id.* at 55a):

> "May I suggest you bear this in mind as you read of the ADL and the AJC [American Jewish

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[4] The transcripts of these broadcasts also are reprinted as part of Commissioner Cox's dissenting statement, App. III, *infra*, pp. 49a-62a.

> Congress] declaring war on the so-called 'radical right' which is, after all, trying to defend America from Communism. You see, my friends, we know that Communism and socialism are one. Last that you remember also the thinking indicated by Israel Zangwill, Socialism is Judaism and Judaism is Socialism, and a bit further, 'My brothers, how can we keep Judaism in a land where there is no Socialism?' "

The alleged link between Judaism and Communism permeates these broadcasts. For example, Cotten discussed one Robert Edward Edmondson who, according to Cotten, endeavored (*id.* at 54a)—

> "to expose what he deemed to be an international conspiracy which appeared to have a great many Jewish adherents. And suddenly, as he fought to expose 'Socialism, Communism, one worldism,' he found his meager resources pitted against the American Jewish Congress and it's limitless 'power of the purses.' His contention was that under FALSE JEWISH LEADERSHIP, the downfall of the nation was being engineered. His documentation would appear irrefutable. . . ."

In another broadcast, on May 27, 1965, Cotten, using standard Aesopian technique, attacked Zionism, stating, for example (in a quotation from former California State Senator Jack Tenney) (R. 50):

> " 'Zionism may be said to be as un-American as Communism or Fascism.' "

Relating the Tenney quotation to United States immigration policy, Cotten pointed out that in 1964 about 7,000 Jews had immigrated to America, and said (R. 51):

> "All freedom loving people should unite in encouraging immigration only from those countries and those peoples who will truly become fully integrated members of society, and fight for the preservation of the Republic, not for the transformation of our nation into that of a satellite nation, disarmed, and subject to some form of world government. Particularly not under a one-world government dictated to from Israel where the Supreme Court of all mankind will hold judgment."[5]

(5) The Licensee's Attitude Toward Its Obligations Under the Fairness Doctrine and Its Responsibility for KTYM's Programming

Mr. Williams, the owner of KTYM, auditioned Cotten's October 7, 1964, program (discussed *supra*, pp. 6-7) before it went on the air and also listened to it while it was being broadcast (R. 211). Yet he never on his own initiative asked Cotten for documentation of any of the accusations made therein. Indeed, there is nothing in the record to indicate that—prior to being contacted by ADL—Mr. Williams ever concerned himself with the questions whether the airing of Cotten's bigoted, defamatory accusations is in the public interest

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[5] The record contains transcripts of similar defamatory innuendos and accusations made in other broadcasts. See, *e.g.*, R. 162-65, 539-40.

During his broadcasts Mr. Cotten asks listeners to write him for written material. The material made available in response to these invitations has included the scripts of his broadcasts as well as additional literature, much of it in the same false, defamatory and bigoted vein as the broadcasts. One of the pieces of mail Mr. Cotten has thus circulated is entitled "Zion's Fifth Column." It argues that Zionism is an international menace and a threat to the American people; that "[i]n its political racism it patterns Nazism"; and that "the *Anti-Defamation League* may be properly termed a *'private Gestapo'*" (R. 147, 148, emphasis in original). See also, "Abraham Lincoln and the Rothschilds," R. 531-38.

and whether he should affirmatively seek out exponents of varying viewpoints.

After learning about Cotten's attacks ADL officials attempted unsuccessfully to resolve the matter at a meeting with a reluctant Mr. Williams (see R. 155, 156). ADL thereafter filed a complaint with the Commission requesting that KTYM's renewal application be designated for a hearing (J.A. 29-36).

The complaint alleged that the owner of KTYM knowingly, or in reckless disregard of his responsibilities as a station licensee, had permitted Cotten repeatedly to broadcast deceptive and misleading anti-Semitic material in "a bigoted attempt falsely to equate, Communism and Judaism" (J.A. 29). It further charged that Cotten's programs had included "defamatory and untrue" attacks on ADL and some of its principal officers and staff; that KTYM had not provided advance notice of the attacks, in disregard of the Commission's fairness doctrine; that "[o]nly after the licensee had been spoken to by representatives of the ADL, and asked for a tape of the offending broadcasts, was such information made available"; and that only "after some discussion [did] the licensee . . . offer equal time for a reply" (J.A. 34, 35). This belated offer was rejected because, in the view of ADL, a "reply" could serve no useful purpose (J.A. 31).

Mr. Williams' response to the complaint on behalf of KTYM (J.A. 38-66), in addition to repeatedly impugning the motives of ADL (*e.g.*, J.A. 50, 54-55, 58), asserted that—

> "to determine what is in fact 'an attack,' the licensee is at a loss. KTYM considers it patently unfair to ask any man who is not a member of a

> particular organization which may be dedicated to fostering its own particular brand of prejudices as against the prejudices of other people and organizations to develop the same sensitivity to 'criticism' of the precepts of the offended organization, as would the members of that offended organization." [J.A. 64-65, quoted as part of Commissioner Cox's dissenting statement, App. III, *infra*, p. 40a.]

The response also dwelt upon ADL's failure to sue Cotten, pointing out that the courts or Post Office Department could provide redress (J.A. 51, 52), and implying that the failure to sue for libel established the truth of Cotten's anti-Semitic accusations and his charges against ADL and its officials (*e.g.*, J.A. 42, 52).

In a subsequent document filed with the Commission, Mr. Williams argued that he was unable to "judge" Cotten's broadcasts (R. 247):

> "KTYM in stating 'Who am I to judge?' meant it to be understood by any objective person that when a commentator on KTYM spends his full time and talent to prepare a 15-minute broadcast per day (on 25-plus stations) that commentator must be reasonable and practical. In two years of broadcasting and of uttering lies and libel, he would have long since been discredited. KTYM in stating 'Who am I to judge?' meant it understood by any objective person that when a delegation of paid professionals from a private pressure group shows up to counter what the commentator says, and expects that KTYM accept their credentials as against the commentator's—'Who am I to judge?' signifies—'if you feel you have a legitimate point in opposition, be KTYM's guest and air your view. Who am I to know that you are right?'"

(6) The Commission's Opinions

On June 17, 1966, the Commission released a memorandum opinion and a letter to KTYM granting its license renewal application and denying ADL's request for a hearing. The Commission found that the October 7, 1964, broadcast contained a personal attack on ADL and one of its officials; and that, in violation of the fairness doctrine, the licensee did not advise ADL of these attacks in advance or furnish ADL with scripts, with the offer of opportunity for reply coming only after ADL had complained. However, the Commission concluded that no action was required because the personal attacks were few and isolated and the station ultimately did offer reply time (App. III, *infra,* p. 13a; App. IV, *infra,* pp. 67a, 68a.)

As to the general defamatory, anti-Semitic material permeating the Cotten broadcasts, the Commission found that those broadcasts would "surely be highly offensive to many persons of the Jewish faith as well as to fair-minded people of other faiths"; that the broadcasts encouraged bigotry and prejudice; and that "[w]e do not hold that these broadcasts, or any similar broadcasts, were in the public interest . . ." (App. III, *infra,* pp. 13a-14a, 16a). Nonetheless, citing the landmark First Amendment decisions in *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949), *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and *Near* v. *Minnesota,* 283 U.S. 697 (1931), the Commission ruled that the First Amendment rendered it powerless to act because (*id.* at 15a):

> "To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would

> cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group."

In the Commission's view, all it may require of licensees, consistently with the constitutional right of free speech, is that the victims of false and defamatory charges be given an opportunity to respond (*id.* at 16a).[6]

Dissenting from what he described as an "incredible" decision, Commissioner Cox observed that the Commission had ruled, "contrary to every relevant precedent of the courts and the Commission itself, that it is no proper concern of the Commission whether the [Cotten] broadcasts were or were not consistent with the public interest" (*id.* at 17a); and he pointed out that, in his opinion, "[t]here is . . . no basis for the majority's view that First Amendment considerations render it . . . helpless to act" (*id.* at 20a).

ADL filed a petition for reconsideration which was denied on essentially the same constitutional rationale.[7] The Commission emphasized that it was enunciating a broad rule "applicable overall to the broadcast field"; that the rule was based on "an overriding policy consideration" in favor of free speech; and that "serious constitutional questions would be raised by any con-

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[6] In the accompanying letter to KTYM, notifying the station that its license had been renewed, the Commission pronounced that the hearing sought by ADL could not "be countenanced under the Constitution, the Communications Act, or the Commission's policy . . ." (App. IV, *infra*, p. 68a).

[7] Commissioner Cox again dissented. Former Commissioner Loevinger filed a concurring opinion. Commissioner Johnson did not participate. (See App. V, *infra*, p. 69a.)

trary course" (App. V, *infra,* pp. 70a, 72a). The latter point was elaborated upon at length in Commissioner Loevinger's concurring opinion where he asserted his view that this case was governed by the principle that (*id.* at 94a-95a)—

> "[a]ny rule which would directly or indirectly establish a test of content for views which are entitled to be spoken or heard through the broadcasting media is inconsistent with the First Amendment."

(7) The Decision of the Court of Appeals

The District of Columbia Circuit affirmed the Commission's orders. The court stressed the licensee's offer of reply time to ADL (App. II, *infra,* pp. 3a, 4a, 5a); it quoted at length from Commissioner Loevinger's concurring opinion on the relationship between First Amendment rights and Commission power involving programming;[8] and it observed that Commissioner

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[8] "For the FCC to promulgate rules regarding permissible and impermissible speech relating to religion would be not only an egregious interference with free speech in broadcasting, but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment.

* * * *

"It is not only impractical—and impossible in any ultimate sense—to separate an appeal to prejudice from an appeal to reason in this field, it is equally beyond the power or ability of authority to say what is religious or racial. There are centuries of bloody strife to prove that man cannot agree on what is or is not 'religion.'

* * * *

"Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of 'falsehood' or an 'appeal to prejudice' as officially defined. All that the government can properly do, consistently with the right of free speech, is to demand

Loevinger's opinion "restated some basic propositions which seem to us unanswerable" (*id.* at 6a).

Judge Wright, in a concurring opinion, observed "that a license to run a radio station is not a license to libel" (App. II, *infra*, p. 8a). Drawing a distinction between personal and group libels, he stated that the latter make "a stronger claim for First Amendment protection" (*id.* at 10a-11a, fn. omitted) and concluded that (*id.* at 11a):

> "Station KTYM offered the Anti-Defamation League substantial time to reply to the anti-Semitic broadcasts. This application of the 'fairness doctrine' will have to suffice."[9]

Continuing, however, Judge Wright noted that (*ibid*)—

> "as this case illustrates, there is a substantial flaw in the theory of the fairness doctrine. Not surprisingly, the Anti-Defamation League refused to dignify or exacerbate the attack by replying. It is likely that other groups would similarly refuse to reply. Under such circumstances, the Commission may decide to require a licensee to seek with reasonable diligence exponents of other views when

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that the opportunity be kept open for the presentation of all viewpoints. . . .

* * * *

"Talk of 'responsibility' of a broadcaster in this connection is simply a euphemism for self-censorship. . . . Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government. *Smith* v. *California*, 361 U.S. 147 (1959); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Washington Post* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F. 2d 965 (1966), *cert. denied*, 385 U.S. 1011 (1967)." [App. II, *infra*, pp. 6a-8a, quoting App. III, *infra*, pp. 91a-93a.]

[9] So far as personal libels are concerned, Judge Wright concurred in the court's decision because he found "no pattern of repeated individual libels" in this case (*id.* at 10a).

it presents one side of a controversial issue in which a group or class is attacked."

REASONS FOR GRANTING THE WRIT

This case presents a question of major significance in defining the proper relationship between the First Amendment's guarantee of free speech, on the one hand, and, on the other, the fairness doctrine and the standard of licensee responsibility for programming promulgated by the Federal Communications Commission in implementation of its statutory duty to "encourage the larger and more effective use of radio in the public interest" (Communications Act of 1934, Section 303(g), 47 U.S.C. § 303(g)).

The specific issue is whether the First Amendment precludes the Commission from holding a hearing on the renewal application of a radio station licensee which —in violation of the balanced programming requirements of the fairness doctrine and in disregard of its responsibility for the content of all programs aired over its facilities (see *supra,* pp. 4-5)—(*a*) broadcast a series of programs containing recurrent bigoted appeals to anti-Semitic prejudice; (*b*) permitted these broadcasts (and the dissemination of related material) either knowing that statements and accusations made therein were false and defamatory or recklessly disregarding their false and defamatory nature; (*c*) failed to send attacked parties a script and to offer them reply time until they otherwise learned of the attack and complained; (*d*) sought to force the individuals in the victimized group either to debate, and thus exacerbate, these reckless charges or to ignore them and thus be unable to counteract with the station's audience their defamatory vilification and prejudice; and (*e*) affirmed to the Commission an intention to continue operating

without affirmatively seeking out exponents of varying viewpoints on controversial public issues and without checking or assuming any responsibility for the nature or truth of the material broadcast over its facilities, asserting that its responsibiltiy is limited solely to providing time for those victims who desire a chance to reply.

Despite the Commission's inability to find that the pattern of conduct described above was in the public interest (see App. III, *infra,* p. 16a), the agency automatically renewed KTYM's license, and, affirming that action, the court of appeals quoted with approval the Commission's reasoning:

> "Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often that [*sic*] not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views." [App. II, *infra,* p. 4a, quoting App. III, *infra,* p. 15a.]

It is important that this Court review the decision below, for, if that decision is permitted to stand, broadcast licensees will have virtually unreviewable discretion to act irresponsibly in program selection, contrary to the clear purpose of the Communications Act of 1934. It is inconceivable that Congress intended broadcast licensees to have "[t]he right to determine, select, supervise, and control programs. . . ," [10] without being

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[10] *United States Broadcasting Corp.*, 2 F.C.C. 208, 225 (1935); see *WBNX Broadcasting Co.*, 12 F.C.C. 837, 840-41 (1948).

potentially accountable in a license renewal hearing for the manner in which they have exercised that right.

Moreover, contrary to the tribunals below, the First Amendment does not require that broadcast licensees be accountable only to their conscience for the knowing or reckless transmission of false and defamatory accusations. As this Court recently ruled, "*the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" *Garrison* v. *Louisiana,* 379 U.S. 64, 75 (1964) (emphasis added); see *Henry* v. *Collins,* 380 U.S. 356 (1965); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279, 280 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374, 387-88 (1967); *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 82-83 (1967). In *Garrison* the court held that utterance of reckless or malicious falsehood could constitutionally subject one to criminal punishment for defamation. And the other cases would allow civil damages in similar circumstances. See also the cases cited in Judge Wright's concurring opinion, App. II, *infra,* pp. 9a-10a, fns. 2, 3.

Linn v. *United Plant Guard Workers,* 383 U.S. 53 (1966), illuminates the error below even more clearly. The Court there ruled that false and defamatory statements maliciously published by either party to a union organizing campaign are actionable under State law, pointing out that "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that *malicious libel enjoys no constitutional protection in any context.*" 383 U.S. at 63 (emphasis added). In support of this conclusion the Court noted with approval that "intentionally . . . circulating defamatory or insulting material known to be false" may result in the loss of rights under the Labor Acts. *Id.* at 60-61.

Using similar reasoning the Federal Communications Commission has denied license renewal applications and taken other remedial action against licensees because of programming deficiencies, and the courts consistently have upheld the agency's orders against First Amendment attacks. *E.g., Trinity Methodist Church, South* v. *FRC,* 62 F. 2d 850, 853 (C.A.D.C.), *cert. denied,* 288 U.S. 599 (1933); *Simmons* v. *FCC,* 169 F. 2d 670, 672 (C.A.D.C.), *cert. denied,* 335 U.S. 846 (1948). This line of authority, extending over a forty-year period, was neither overruled by the Commission nor challenged by the court below despite petitioner's reliance before both tribunals upon this group of cases.

The tribunals below, ignoring the above precedents and acting under a mistaken view that their rulings were compelled by the First Amendment, made inviolate speech which has never enjoyed constitutional protection; they did so in the belief that their rulings would promote freedom of expression and robust debate. That belief is misplaced. The decisions below will merely entrench the position of persons who would irresponsibly defame others, adding nothing to the national debate on important public issues. Since broadcast licensees, under the court's and Commission's rationale, no longer have any affirmative obligations in regard to programming—having only to offer reply time to victims of false and defamatory accusations—the decisions below ensure that other viewpoints on controversial issues will *not* be aired in situations where a "reply" would not be meaningful, or where a reply would simply provide added circulation to defamatory material, or where the victims do not learn of the false and defamatory broadcasts.

This is well illustrated by the facts of this case where, as Judge Wright correctly perceived, the right to reply is not a satisfactory vehicle for promoting the

public interest (see App. II, *infra,* p. 11a). Cotten repeatedly has broadcast defamatory appeals to anti-Semitic prejudice, purporting to support his denunciations with false and misleading information. Cotten's broadcasts are specific in their condemnation and accusation but vague and imprecise in their relation to outside events. They suggest mysterious international conspiracies, nebulous links to Communism, unspecified acts of treason. They are the stuff of the propagandist and character assassin, not the news commentator.

A fair and meaningful rebuttal is impossible in these circumstances. If the rebuttal focused on important public issues with which Jews are involved, it would have no relationship to the Cotten broadcasts. If the rebuttal focused on Cotten's false and defamatory accusations, it would serve only to focus more attention upon and lend dignity to Cotten's remarks, as can be seen from KTYM's statement of the issues it felt ADL should discuss (R. 221):

> "Cotten refers to the ADL as a 'Jewish Gestapo'. This is certainly a statement to be countered and one worthy of reply. Statements to the effect that Rabbi so-and-so said this-and-that is a question of fact, and if incorrect, should be countered. The fact that the Jewish World is a Communist newspaper, and one not typical of the beliefs of the majority of the Jewish people, is a subject worthy of a reply. Cotten has made these assertions. KTYM has offered the ADL equal time without charge."

Yet, under the decisions below, KTYM need not examine the content of Cotten's future programs; nor does the licensee have any obligation to seek out willing exponents of other viewpoints. The licensee, in sum, may allow Cotten to say anything he pleases,

and the Commission is powerless to act in any way except to require that defamed victims be allowed to reply, even though a reply may be neither feasible nor meaningful, and the defamed individuals and groups understandably may be reluctant to publicly involve themselves further in the dispute and "dignify or exacerbate the attack . . ." (App. II, *infra*, p. 11a, Judge Wright, concurring). The Commission's power (and duty) to protect the public interest obviously cannot depend on the willingness of third-parties to answer false and defamatory charges. Unless the Commission is enabled to require broadcast licensees to account at a renewal hearing for their failure affirmatively to seek out willing exponents of varying viewpoints on controversial issues and to exercise reasonable judgment as to what they permit to be aired over their facilities, the Communications Act's objective of fostering full, fair debate and factual commentary will be retarded to the detriment of the listening public.

Finally, it should be emphasized that while the issue in the instant case is independently significant for the reasons discussed above, that issue takes on added importance when considered in light of three other recent cases raising similar questions of the extent to which the First Amendment permits Commission action involving an appraisal of the content of broadcast material, *Red Lion Broadcasting Co.* v. *FCC,* 381 F. 2d 908 (C.A.D.C.), *cert. granted,* 389 U.S. 968 (1967); *Radio Television News Directors Ass'n* v. *United States & FCC,* 400 F. 2d 1002 (C.A. 7), *cert. granted,* January 13, 1969 (No. 717, O.T. 1968); *Banzhaf* v. *FCC & United States,* 14 Pike & Fischer R.R. 2d 2061 (C.A. D.C. 1968). These cases all involve First Amendment challenges to various actions taken by the Commission under the fairness doctrine, *i.e.,* as to personal attacks

(*Red Lion* and *Radio Television Ass'n*), political editorials (*Radio Television Ass'n*) and cigarette advertising (*Banzhaf*).[11] The instant case complements those issues, presenting the fundamental question whether the Commission's requirement that licensees offer reply time in certain circumstances defines the outer limits of the power of the Commission to concern itself with the public interest in licensee programming without running afoul of the First Amendment's guarantee of free speech.

It is particularly important that this Court resolve the issue in the instant case in conjunction with its resolution of the conflicting decisions in *Red Lion* and *Radio Television Ass'n* as to the constitutionality of the requirement that licensees provide reply time to victims of personal attacks. In *Radio Television Ass'n* the Seventh Circuit struck down the reply time requirement as violative of the First Amendment, reasoning that enforcement thereof would "operate to discourage a licensee from engaging in the broadcast of controversial issues. . . ." 400 F. 2d at 1014.

The Seventh Circuit, however, drew a sharp distinction between the affirmative, balanced programming obligations imposed upon licensees by the overall fairness doctrine and the requirement that licensees provide reply time for persons personally attacked over their facilities. The court refused to strike down the affirmative aspects of the fairness doctrine, making plain its view that enforcement of the requirement of

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[11] In *Banzhaf* the court, upholding against First Amendment attack the Commission's requirement that broadcast licensees carrying cigarette advertising also present the case against smoking, emphasized that "product advertising is at least less rigorously protected [by the Constitution] than other forms of speech." 14 Pike & Fischer R.R. 2d at 2088 (fn. omitted).

balanced programming would not be likely to discourage licensee broadcasts on controversial issues because "the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the 'public interest, convenience, and necessity.'" *Id.* at 1013. Since any determination not to renew a license could only be made at a Commission hearing of the type requested by ADL below, the Seventh Circuit's reasoning on this point directly conflicts with the rationale of the decisions below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1969

APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 20,770

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
PACIFIC SOUTHWEST REGIONAL OFFICE, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

TRANS AMERICAN BROADCASTING CORPORATION, *Intervenor*

On Appeal from Orders of the
Federal Communications Commission

Before: WILBUR K. MILLER, *Senior Circuit Judge,* and BURGER and WRIGHT, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on appeal in this case are hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk

Dated: September 30, 1968

Separate concurring opinion by Circuit Judge Wright.

A true Copy,
Test: NATHAN J. PAULSON
Clerk of the United States Court of Appeals
for the District of Columbia Circuit

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,770

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
PACIFIC SOUTHWEST REGIONAL OFFICE, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

TRANS AMERICAN BROADCASTING CORPORATION, *Intervenor*

On Appeal from Orders of the
Federal Communications Commission

Decided September 30, 1968

Mr. Harry M. Plotkin, with whom *Messrs. George R. Kucik* and *David A. Brody* were on the brief, for appellant.

Mr. John H. Conlin, Associate General Counsel, Federal *Communications* Commission, with whom *Messrs. Henry Geller,* General Counsel, *Stuart F. Feldstein* and *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Mark E. Fields, with whom *Mr. Samuel Miller* was on the brief, for intervenor.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and BURGER and WRIGHT, *Circuit Judges.*

BURGER, *Circuit Judge:* The Federal Communications Commission granted renewal of the license of Trans American Broadcasting Company for Station KTYM, Inglewood, California. Appellant, the Anti-Defamation League, opposed renewal claiming that certain programs of the Licensee had contained anti-Semitic material. After investi-

gation of these charges renewal was granted without an evidentiary hearing on Appellant's opposition.

The material challenged as anti-Semitic originated in certain 15 minute paid-time programs under the control of a commentator, one Richard Cotten. The Commission readily acknowledges that on several of Cotten's 15 minute programs of commentary he made offensive comments concerning persons of the Jewish faith, equating Judaism with Socialism and Socialism with Communism. Two broadcasts, one on October 7, 1964, and one on May 27, 1965, were singled out and transcripts of those programs were before the Commission. The League's complaint is that the Licensee did nothing to remedy these programs until the programs were called to its attention and then declined either to cancel the program or to control Cotten in any way. The Licensee then offered the League free equal time to respond to Cotten's paid broadcasts or use the time in any way it desired. The League advised the Commission that it would not accept the tender of free time.

In granting renewal of the KTYM license without conducting an evidentiary hearing on the content of Cotten's programs, the Commission explained that no dispute of fact as to the content of the Cotten program existed and no issue as to KTYM's performance was raised apart from the Cotten programs. The Commission determined that as to a specific attack by Cotten on Arnold Forster, General Counsel of the League, KTYM had violated the "fairness doctrine" because the station had failed to give advance notice of the facts to Forster or the League. However, the Commission concluded that this was an isolated violation which neither afforded a basis for denying the license renewal nor necessitated an evidentiary hearing since the station had offered free time for a reply. That offer was still outstanding when the Commission acted.

The Commission considered the broad issue raised by the League that Cotten's utterances were so contrary to the

public interest that a Licensee carrying such programs should be disqualified for renewal. The Commission declared that its historic policy in conformity with Congressional authority precluded censorship of programs.

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often that [sic] not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

Joint Appendix 69.

The Commission went on to find that "an overall review of the stations operation" showed that renewal of the license would be in the public interest. In addition to affirming the need for KTYM's tender of free time to Appellants the Commission reprimanded the station for failure to give advance notice to the League as to the broadcast which included a personal attack on League officials.

Appellant's primary argument is that "recurrent bigoted appeals to anti-Semitic prejudice" and tolerance of personal attacks without notice to those attacked, constituted a basis for denial of license renewal and required an evidentiary hearing on those issues.

The Commission's position is that Congress does not permit a broadcaster to censor broadcasts involving attacks on

persons or groups but that the fairness doctrine requires the Licensee to afford free time for response. The Commission opinion pointed to the long standing policy to encourage open discussion of all points of view, valid or otherwise, and noted that serious First Amendment questions would be raised by any policy inhibiting "robust debate."

The Commission relies also on procedural regularity as a basis for not conducting an evidentiary hearing, contending that all factual issues raised by Appellants were fully explored and that there was no dispute as to the facts which would be the subject of such a hearing.

Our examination of the record satisfies us that the Commission acted within its authority in denying an evidentiary hearing as to the undisputed facts which formed the basis of Appellant's claims. The disposition of Appellant's claims turned not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts.

The First Amendment aspect also deserves some comment. The Supreme Court has not defined the scope of First Amendment application to broadcasting but has intimated in dicta that it applies to licensed media.

> We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.

Lovell v. *City of Griffin*, 303 U.S. 444, 452, (1938). In *Farmers E. & C. Union* v. *WDAY*, 360 U.S. 525, 527, 529-30 (1959), the Supreme Court noted that Congress had withheld from the Commission any power to censor broadcasts.

> The term "censorship", however, as commonly understood connotes *any* examination of thought or expression in order to prevent publication of "objection-

able" material. • • • Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any censorship over radio communication.

See also American Communications Ass'n v. *Doud,* 339 U.S. 382, 396 (1950); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949); *West Virginia Bd. of Ed.* v. *Barnette,* 319 U.S. 624, 641 (1943).

Commissioner Loevinger, while concurring fully with the decision of the Commission, restated some basic propositions which seem to us unanswerable:

> For the FCC to promulgate rules regarding permissible and impermissible speech relating to religion would be not only an egregious interference with free speech in broadcasting, but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment.
>
> • • •
>
> It is not only impractical—and impossible in any ultimate sense—to separate an appeal to prejudice from an appeal to reason in this field, it is equally beyond the power or ability of authority to say what is religious or racial. There are centuries of bloody strife to prove that man cannot agree on what is or is not "religion."
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> • • •
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> Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of "falsehood" or an "appeal to prejudice" as officially defined. All that the government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints. Yet this would be impossible under the rule

espoused by the ADL. The present case illustrates the matter. The assailed commentator here does not ostensibly attack the Jews as a religious group, but does attack Zionists and the ADL because the latter is conducting a campaign against "right wing extremists," which is said to include that commentator. But if anyone is permitted to express views favorable to Zionism or the ADL, or unfavorable to "right wing extremists" or the assailed commentator, then the Fairness Doctrine requires that someone representing the contrary viewpoints be given the opportunity to reply. This, of course, is precisely what the ADL contends cannot be permitted. If what the ADL calls "appeals to racial or religious prejudice" is to be classed with hard-core obscenity, then it has no right to be heard on the air, and the only views which are entitled to be broadcast on matters of concern to the ADL are those which the ADL holds or finds acceptable. This is irreconcilable with either the Fairness Doctrine or the right of free speech.

Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. So this formulation does not advance the argument either constitutionally, ideologically or practically. Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government. *Smith* v. *California*, 361 U.S. 147 (1959);

Bantam Books v. *Sullivan*, 372 U.S. 58 (1963); *Washington Post* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), *cert. denied*, 385 U.S. 1011 (1967).

Joint Appendix 143-45.

While the Commission has the power and indeed the duty to consider a pattern of libellous conduct in a license renewal hearing, the First Amendment demands that it proceed cautiously and Congress, as we have noted, limited the Commission's powers in this area. We hold that the record reflects substantial evidence in support of the Commission's decision.

Affirmed.

WRIGHT, *Circuit Judge, concurring:* Subject to the following observations, I join the court's opinion in this case.

The Anti-Defamation League charges that Station KTYM, knowingly and on repeated occasions, allowed to be broadcast a series of programs containing false and defamatory statements about Jews in general, and on one occasion about some Jewish individuals in particular.[1] Two types of program content are thus challenged—libeling an individual and attacking a group—and different approaches are required for each.

With respect to individual libel, I start with the premise that a license to run a radio station is not a license to libel. False defamatory statements, made knowingly or with reckless disregard of their falsity, cannot claim the shelter of the First Amendment. *New York Times Co.* v.

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[1] The Commission concluded that "the Cotten broadcast of October 7, 1964, contained a personal attack on the ADL and its General Counsel, Mr. Forster. The other broadcasts referred to did not contain personal attacks on ADL or its officials, but did contain statements that can be regarded as anti-Semitic * * *."

Sullivan, 376 U.S. 254, 279-280 (1964). A radio station, like a newspaper, cannot claim immunity from libel laws.[2]

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[2] In *Gariepy* v. *Pearson*, 92 U.S. App. D.C. 337, 207 F. 2d 15, *cert. denied*, 346 U.S. 909 (1953), the court allowed the issue of libel to go to a jury. There both Drew Pearson and a radio station were sued for libel for a broadcast by Pearson over the station. The court noted that the station "examined the script in advance and admits it 'caused' the words set forth in appellant's complaint to be broadcast." 92 U.S. App. D.C. at 338, 207 F. 2d at 16. The same is true in the present case. *See also Gearhart* v. *WSAZ, Inc.*, E.D. Ky., 150 F. Supp. 98 (1957), *affirmed*, 6 Cir., 254 F. 2d 242 (1958) (radio station sued for libel for one of its newscasts); *cf. Lesesne* v. *Willingham*, E.D. S.C., 83 F. Supp. 918 (1949) (Western Union liable for transmission of telegram where it knew it was libelous); *see* cases collected in Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727 (1951). Even the National Association of Broadcasters, in promulgating a model radio defamation statute, allowed suits for libel where the radio station "has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast." Remmers, *supra* at 741.

There is one narrowly drawn exception: a radio station is not responsible for libelous statements made in a political broadcast by a candidate for public office. *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). This is so because § 315(a) of the Federal Communications Act precludes a station from deleting any of the material from such a speech. The station here, however, is under no such disability, as the Commission in brief agrees:

> "• • • The evidence before the Commission further showed that KTYM recognized its right to accept or reject programming material • • • and expressly provides in its contracts for the right to accept or reject programs in each separate case. • • •"
>
> "KTYM filed pleadings • • • setting forth new details such as its manner of screening the Cotten and other broadcasts to remove matter 'which is adjudged unduly harsh and unnecessary' • • •."

Brief for appellee, pp. 36, 9.

Thus when a station allows a series of programs in which individuals are repeatedly defamed and the station is put on notice (for example, by the complaint of an offended individual) that such programs contain false and unsubstantiated statements, in a renewal proceeding involving that station's license the Commission should: (1) determine whether the station knew of the falsity of the material or allowed it to be broadcast in reckless disregard of its truth or falsity (the standard of *New York Times Co.* v. *Sullivan*), and (2) consider whether such programming is in the public interest. Neither the First Amendment nor a policy of encouraging stimulating and constructive radio broadcasting would preclude the Commission from refusing to renew a license because of repeated individual libels; nor would the Commission be prevented from cancelling the license of a broadcaster who persisted in such a course of programming.[3] In the instant case there is no pattern of repeated individual libels. Therefore I concur in affirming the Commission.

Attacking a group presents a harder problem. Under the law of libel, defamation of a broad group or class is not usually actionable.[4] And this kind of speech, detestable as some of its anti-Semitic and racist aspects may be, approaches the area of political and social commentary. To this extent it makes a stronger claim for First Amend-

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[3] This would not be prohibited "censorship," 47 U.S.C. § 315 (1964), any more than would the Commission's considering on a license renewal application whether a broadcaster allowed "coarse, vulgar, suggestive, double-meaning" programming; programs containing such material are grounds for denial of a license renewal. *Palmetto Broadcasting Co.*, 23 PIKE & FISCHER R.R. 483, 484 (1962), *affirmed*, 118 U.S. App. D.C. 144, 334 F. 2d 534, *cert. denied*, 379 U.S. 843 (1964).

[4] *See* 33 AM. JUR. *Libel and Slander* § 192 (1941).

ment protection.[5] I share the desire of the Commission and the court to foster free and full debate on political and social issues. For this reason, broadcasters should not be so burdened in this area that they would shy away from presenting controversial issues.

Station KTYM offered the Anti-Defamation League substantial time to reply to the anti-Semitic broadcasts. This application of the "fairness doctrine" will have to suffice. To go further, requiring stations to check the truth of all commentary attacking a group or class, might result in a "chilling effect," constraining stations to steer clear of controversial material. However, as this case illustrates, there is a substantial flaw in the theory of the fairness doctrine. Not surprisingly, the Anti-Defamation League refused to dignify or exacerbate the attack by replying. It is likely that other groups would similarly refuse to reply. Under such circumstances, the Commission may decide to require a licensee to seek with reasonable diligence exponents of other views when it presents one side of a controversial issue in which a group or class is attacked.[6]

The requirements I would place on broadcasters, and the Commission, in dealing with material libeling an individual or attacking a group, are consistent with the Commission's overall policy of broadcaster responsibility. For example,

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[5] In *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), a divided Supreme Court upheld a conviction under a statute outlawing defamation of a racial or religious group. However, far from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court.

[6] Nothing I have said would preclude the Commission from finding that a station was not in the public interest whose regular programming consisted solely of views slanted toward one side of a controversial issue or issues, even if the station allowed the other side time to reply. The Commission could conclude that a station which offered more rounded programming better served the public.

in the context of protecting the public from rigged quiz shows, the Commission, in its report on Program Policy, 20 PIKE & FISCHER R.R. 1901, 1904 (1960), stated:

> "* * * [T]he Commission had made its position clear that, in fulfilling its obligation to operate in the public interest, a broadcast station is expected to exercise reasonable care and prudence with respect to its broadcast material in order to assure that no matter is broadcast which will deceive or mislead the public. * * *"

And in a major statement on the fairness doctrine, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 FED. REG. 10415, 10421 (1964), the Commission stated:

> "* * * Under fundamental communications policy, the licensee, with the exception of appearances of political candidates subject to the equal opportunities requirement of Section 315, *is fully responsible for all matter which is broadcast over his station.* It follows that when a program contains a personal attack, the licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. * * *" (Emphasis added.)

Thus it is clear to me that the Commission is not helpless to act in this area.

APPENDIX III

FCC 66-545
84885

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of

Complaint of Anti-Defamation
League of B'nai B'rith Against
Station KTYM, Inglewood, California

Memorandum Opinion

By the Commission: Commissioner Cox dissenting and issuing a statement.

The Commission is renewing the license of Station KTYM, Inglewood, California in circumstances which make some comment and explanation appropriate. Renewal of this license was opposed by the Pacific Southwest Regional Office of the Anti-Defamation League of the B'nai B'rith (ADL) on the ground that broadcasts of "Richard Cotten's Conservative Viewpoint" on October 7, 1964, and May 17 and 18, 1965, over KTYM disseminated anti-Semitic material and contained personal attacks on the ADL and its officers and staff. In addition to the ADL complaint, the Commission had received the response of KTYM to the complaint, a reply to the response, and numerous statements and exhibits associated with these documents. All of the documents filed with the Commission in this matter have been considered in reaching a conclusion, and it appears that the facts are fully presented by the documents before the Commission.

The Commission has concluded that the Cotten broadcast of October 7, 1964, contained a personal attack on the ADL and its General Counsel, Mr. Forster. The other broadcasts referred to did not contain personal attacks on ADL or its officials, but did contain statements that can be regarded as anti-Semitic, and that will surely be highly of-

fensive to many persons of the Jewish faith as well as to fair-minded people of other faiths. In order to preclude any possibility that the ruling of the Commission might be construed by anyone as indicating a contrary view, it is hereby declared that the individual Commissioners wholly disapprove of broadcasts which encourage bigotry or prejudice against any race, religion, or group. Individual Commissioners joining in this opinion have the strongest personal feelings against the views represented by the assailed broadcasts, and others similar to them, but believe that the action of the Commission must be governed by legal principles rather than the personal feelings of the Commissioners.

Following the complaint of the ADL, station KTYM offered the ADL an opportunity to reply to the Cotton broadcasts. It appears that ADL was offered equal and comparable time to that of the broadcasts complained of. ADL took the position that it should not be required to, and would not, reply to anti-Semitic broadcasts, but that such broadcasts are so contrary to the public interest that a licensee which permits them to be made is thereby disqualified to hold a broadcast license.

This controversy has engendered deep, understandable, and proper emotions on both sides, and these have resulted in a mass of documents and discussion. However, the issue that is now presented is relatively simple: should the Commission act to suppress the expression of views which it abhors or to require the opportunity for the expression of opposing views? From the viewpoint of the broadcaster, does a licensee fulfill his legal duty when he offers adequate and comparable time to reply to broadcasts containing allegedly defamatory and false comment, or has a broadcast licensee a legal duty to prevent broadcast on his facilities of comment containing defamation or falsehood?

The issue presented here is not whether the broadcasts in question were proper, or were false and defamatory, or were anti-Semitic, or were in the public interest. Altho[illegible]h

these issues are of greatest interest to the parties, lend themselves to the most dramatic and forceful statements and may attract the most attention, they are not legal issues that are properly before the Commission in this proceeding. The Commission cannot put such matters in issue without becoming the censor of broadcasting, which it is forbidden to do. If the Commission were to undertake to judge in this proceeding that certain broadcasts are false, defamatory and anti-Semitic, and therefore contrary to the public interest, it would soon be called upon to make similar judgments that other broadcasts are false and defamatory to Negroes, to Socialists, to Catholics, to pacifists, to militarists, and eventually to the members of every ethnic, religious and political grouping.

The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often that [sic] not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." Terminiello v. Chicago, 337 US 1, 4 (1949); Chaplinsky v. New Hampshire, 315 US 568; Ashton v. Kentucky, ——

US ——, 34 LW 4398 (1966); This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.

In broadcasting it is required that controverted or controversial matters be subject to fair and adequate opportunities for reply by those of differing viewpoints. The details of this doctrine are discussed in other Commission statements and are not in issue here. In this case it is plain that the licensee has offered and has affirmed his intention to continue to offer fair and reasonable opportunity for the expression of conflicting and opposing viewpoints to those of the broadcasts complained of. This is all that the law requires. We cannot make the right to a license renewal dependent on our judgment as to whether the assailed broadcasts were in themselves false and defamatory or not. Near v. Minnesota, 283 US 697 (1931). We do not hold that these broadcasts, or any similar broadcasts, were in the public interest, but rather that it is in the public interest to have free speech on all subjects on licensed broadcast facilities provided only that all viewpoints are afforded a fair and equal opportunity for expression.

Action is being taken by a letter addressed to KTYM, a copy of which is attached.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Secretary

Adopted: June 17, 1966
Released: June 17, 1966

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* See attached statement of Commissioner COX.

Statement Of Commissioner Kenneth A. Cox Dissenting To The Grant Of Renewal Without Hearing

The majority's decision to grant a renewal of license to station KTYM on the record before us, and without hearing, is to me incredible.[1] The station has broadcast, without inquiry into its truthfulness, material which is patently defamatory and apparently composed of deliberate untruths. It proposes to continue this practice in a new license period. The Commission does not find that such broadcasts are consistent with operation in the public interest. It does not find such material is protected by the Constitution. It does not hold that a responsible broadcaster, faithful to his public trust, could carry such material without even checking its factual foundations. But it holds, contrary to every relevant precedent of the courts and the Commission itself, that it is no proper concern of the Commission whether the broadcasts were or were not consistent with the public interest. It holds, in short, that it is no proper concern of the Commission whether the station operates in the public interest or not.

I think it clear that the licensee of station KTYM has failed to exercise even the beginning of proper licensee responsibility for the use of his station, and that he has broadcast, with reckless disregard of its truth or falsity, viciously defamatory matter which is not protected against Commission concern by the First Amendment. Because the questions presented are so important to the administration

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[1] I agree that KTYM's presentation of the Richard Cotten program broadcast October 7, 1964, contained a personal attack on the ADL and on its General Counsel, Arnold Forster. The Commission's letter to the licensee correctly points out the station's failure to send them a transcript of the attack with an offer of time to respond, as required by the Commission's Fairness Doctrine. We have previously made clear that a licensee cannot properly sit back and wait for complaint where he has broadcast a personal attack. I would therefore also censure the station for this failure to discharge its responsibilities as a broadcast licensee.

of the Communications Act, I feel it is necessary that I set forth my views in some detail. However, to reach the serious questions which the majority ignores, it is first necessary to clear away any misconception as to our duty.

In an unbroken line of decisions, this Commission and the courts of the United States have enunciated the Commission's authority and, indeed, its duty to deny a renewal of license where the station's program service has not been in the public interest. Where, as here, the material is maliciously harmful, and is so lacking in any possible social value as to be beyond the protection of the Constitution, the Commission's duty is clear. Such action by the Commission is not forbidden prior censorship, and is not in contravention of any constitutional right.

Over a period of almost 35 years the courts have agreed that program service is an essential part of operation in the public interest. Thus, under the Radio Act of 1927 with exactly the same standards as the present Communications Act, the Federal Radio Commission was sustained in *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, *cert. den.* 284 U.S. 685, 288 U.S. 599, decided in 1932, when it denied a renewal of license because the licensee had, *inter alia*, "abused [the license] to broadcast defamatory and untrue matter." The court was at pains to point out that *Near* v. *Minnesota*, 283 U.S. 697, which prohibited prior censorship by government, did not operate as a bar to denial of renewal of a license based on the licensee's past conduct. See also *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission*, 60 App. D.C. 79, 47 F. 2d 670.

In 1952, the Commission was again sustained in refusing to grant an initial license to one who made defamatory attacks. *Independent Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 396, 193 F. 2d 900, *cert. den.* 344 U.S. 837. In 1964, the Commission was sustained in its denial of renewal based upon the broadcast

of deceptive "treasure hunts." *KWK Radio, Inc.* v. *Federal Communications Commission,* 119 U.S. App. D.C. 144, 337 F. 2d 540, *cert. den.,* 380 U.S. 910. The year before it had been sustained in a denial of a renewal based in large part upon similar programming excesses. *Immaculate Conception Church* v. *Federal Communications Commission,* 116 U.S. App. D.C. 73, 320 F. 2d 795, *cert. den.* 375 U.S. 904. And should the Commission have to be reminded that as recently as March 25, 1966, the Court of Appeals directed it to hold a hearing on a renewal involving complaints of improper discriminatory programming (going beyond the mere failure to put on both sides of controversial issues)? *Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* —— U.S. App. D.C. ——, —— F. 2d ——, No. 19,409. The majority does not even mention these cases when it tells us that the Commission cannot determine whether a station's program service has been, or will be, consistent with the public interest. It has simply thrown out the statutory standard which Congress has commanded us to apply.

The Commission several times states that it is not holding that these broadcasts were in the public interest. The statute imposes a duty upon the licensee to operate in the public interest and a duty upon the Commission to grant a renewal of license only if it finds that operation is in the public interest. See Sections 307(a), (d). What became of these duties? The reason given by the majority for sloughing aside its duty—the desire ". . . to have free speech on all subjects . . ."—ignores the vital consideration that there is no public interest in a pattern of calculated, reckless falsehoods concerning individuals or groups—in wantonly ruining lives and reputations. The Supreme Court in recent cases[2] has made clear that such speech has no Constitutional protection and may properly be the sub-

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[2] See particularly *Garrison* v. *Louisiana,* 379 U.S. 64, discussed within.

ject of damages, actual and punitive, in State courts. There is thus no basis for the majority's view that First Amendment considerations render it, the Federal agency charged with seeing to it that radio stations operate in the public interest, helpless to act.

With that out of the way, let me turn to the issues in the case, first giving the necessary background.

1. *Background*

This matter came to our attention through a complaint of October 25, 1965 filed by the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (ADL), which claimed there was a serious question whether the license of standard broadcast station KTYM, Inglewood, California, should be renewed. The complaint alleged in substance that station KTYM has fallen short of its responsibility as a licensee by presenting programs in a recorded series entitled "Richard Cotten's Conservative Viewpoint" which contained intemperate and false attacks on the Jewish community.

The Commission requested the license's comments, directing particular attention to the statement that Mr. A. J. Williams, President and sole owner of the licensee, had stated that he had no power to censor any broadcast. The response of station KTYM, filed on December 3, 1965, asserted that any controversial program of a political nature is bound to displease some people; that the Cotten broadcasts had been almost unanimously supported in letters received by KTYM, which indicated that they served a public need; that the Anti-Defamation League had been offered free time to answer the Cotten broadcasts—without acceptance by that organization; and that in view of the great importance of freedom of speech, the licensee would exercise its right to reject programs of the nature involved here with great restraint, and not at the "prodding of a group of paid professionals whose viewpoint and interests

are specific to its [i.e. the ADL's] own personal self-interest. . . ."[3]

On January 13, 1966, the ADL filed a response, in which it stated the essence of its complaint to be "that by permitting its facilities to be used for the dissemination of several blatantly anti-Semitic broadcasts, the said licensee had caused serious question to be raised as to the propriety of renewing its license. The complaint charged that the licensee had allowed one Richard Cotten to make a calculated appeal to anti-Semitic prejudice by attempting falsely to equate Communism and Judaism."

Finally, the licensee filed a further response on February 7, 1966. This response reiterated that the ADL could have answered the Cotten broadcasts on free time offered by the station, and that this is the fair solution where people have conflicting viewpoints. It stated that the licensee would not set himself up as a judge of the programs because he could not accept the Anti-Defamation League's credentials against those of Cotten to censor Cotten, and that "when a commentator on KTYM spends his full time and talent to prepare a 15-minute broadcast per day (on 25-plus stations) that commentator must be reasonable and practical. In two years of broadcasting and of uttering lies and libel, he would have long since been discredited." The response also urged that Cotten could be stopped in court if he deliberately lied, and that the licensee cannot make such judgments, which should be left to public opinion.

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[3] Pages 24 through 29 of the KTYM response, which represent the principal statement of Mr. Williams' views on his responsibility for material he broadcasts, are appended hereto as Appendix A, exclusive of two exhibits therein referred to which show that KTYM has carried spot announcements for The United Jewish Welfare Organization, and that the KTYM contract form reserves to the station the right to cancel any contract for the broadcast of matter over its facilities. Other statements by Mr. Williams on this central issue will be referred to later.

I have set forth above the essentials of the dispute, and will develop certain key facts at greater length in the discussion which follows. I am also attaching as Appendix B hereto copies of Richard Cotten's broadcasts on KTYM of October 7, 1964 and January 6, 7, and 8, 1965.[4]

2. *The licensee's failure to exercise responsibility as to a defamatory series of broadcasts based on calculated falsehood or reckless disregard of the truth*

In my view, the essential allegations of the ADL, corroborated as they are by KTYM, make it impossible for the Commission to find at this time that the public interest would be served by the grant of a renewal of license to KTYM. The facts before us, which ought to be the subject of a full public hearing, demonstrate that the owner of KTYM has failed to exercise the basic responsibility of a licensee for material broadcast over his station by presenting, without reasonable investigation, material which defames a religious group and as to which there is a serious question whether it is based on calculated falsehood or reckless disregard of the truth.

Two things must first be made absolutely clear. One is that we are concerned here with *a series of programs* whose general character was known to the licensee. We are not dealing with an isolated program; with a debate, where the licensee may not know in advance what the participants will say; or with a broadcast by a candidate for public office, the only class of program as to which Congress withheld from the licensee his normal censorship powers. The specific programs of which complaint was made were identified and called directly to the attention of Mr. Williams. As to at least one of them—the program of October 7, 1964, which was the basis for ADL's original

[4] In addition, ADL complained, at various times, of programs broadcast on May 7, 1964, June 1, 1965 (first mistakenly identified as presented on May 17 and 18, 1965), and November 26, 1965, alleging that all of these contained anti-Semitic matter.

complaint to the station—he says that he had the program auditioned before it was aired and listened to it on the day it was broadcast.[5]

The other is that the broadcasts here at issue (i) are defamatory, in that they unquestionably attempt to tie Jews and Judaism to Communism, and thus to attack the reputations and the place in society of millions of Americans, and (ii) on the record before us, are based on calculated falsehood or reckless disregard for the truth. A consistent theme of the four broadcasts, whose scripts are appended hereto as Appendix B, is that Jews are pro-Communist. Thus, they repeatedly utilize quotations by Jews, whose religion is particularly pointed out by Mr. Cotten, and who apparently state, "from the horses mouth no less" as the January 6, 1965 broadcast puts it, that Judaism is the same as Marxism or Socialism, and that anti-Communism is the same as anti-Semitism. The quotations are from two publications of the early 1940s, *Jewish Voice* and *Jewish Life;* from Rabbi Stephen Wise, who died in 1949; and from a book by the poet Israel Zangwill about the London ghetto, written in the 1890s.[6] This material is described by Mr. Cotten in the broadcasts as extremely significant, and is used to substantiate his apparent thesis that it is an inherent kinship of Judaism and Communism which explains the attacks by such or-

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[5] Response filed February 7, 1966, p. 18.

[6] The October 7, 1964 broadcast also quotes from a letter from Joseph P. Kamp "to the United States government" written some time before October 20, 1951 which stated with respect to Arnold Forster, General Counsel of the ADL, that, "If you can get President Truman to let you look at the FBI files, you will discover that Forster's right name is Fastenburg and that he was a member of the Communist spy ring."

ADL says the Forster spy charge is wholly false, and has submitted an affidavit by Mr. Forster categorically denying that he was a member of a Communist spy ring, or that he has ever been a Communist, a member of the Communist Party or a Communist sympathizer.

ganizations as the ADL against groups which Mr. Cotten believes are dedicated only to the fight against Communism and Socialism (deemed by him to be the same, e.g., in the broadcast of January 6, 1965, he said, after again quoting from *Jewish Voice* and *Jewish Life,* "You see, my friends, we know that Communism and socialism are one."). The ADL claims that Mr. Cotten's attempt to link Communism with Jews by means of such material is calculated falsehood because the quotations are either untrue (e.g., there is no substantiation for the Rabbi Wise quotation), or dishonestly used (e.g., the statements of a character in the Zangwill book are misleadingly imputed to Zangwill himself, and *Jewish Voice* and *Jewish Life* were Communist publications not shown to be representative of Jewish opinion).

What is the licensee's responsibility in these circumstances? A broadcast licensee's responsibility for all matter carried on his station, other than broadcasts by political candidates, is clear.[7] But no one would argue that

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[7] *Report on Chain Broadcasting* (May 2, 1941) p. 66:

> "The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory."

Regents of New Mexico v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 906 (C.A. 10, 1947):

> "[I]t is the right and non-delegable duty of the [licensee], acting reasonably, to determine whether a program offered by [an outside party] is in the public interest. . . ."

Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Pike & Fischer, Radio Regulation 1901, 1912-13 (1960), "Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. . . ." Only with respect to broadcasts by candidates for political office

he must pre-screen or pre-audition all material carried, nor would I suggest that he must examine the source for every statement made on his station before permitting it to be broadcast. This is not feasible, for example, with respect to news items coming from reputable news services, or in the case of a debate or panel show. There are a host of situations where the licensee presents spokesmen whose conflicting views on public issues can and should properly be left to public scrutiny and resolution, so long as both sides are heard. To impose a more stringent requirement of a prior check on the accuracy of all statements in these situations, which of course do not exhaust the list, would inhibit the free dissemination and discussion of news and ideas that is the underlying objective of the First Amendment and the public interest standard of the Communications Act.

Thus, I fully agree with the majority that to "require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would . . . operate to deprive the public of the opportunity to hear unpopular or unorthodox views". My disagreement is that the majority does not recognize the distinction between this general principle

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did Congress relieve the licensee of this responsibility by stripping him of the power to censor. Section 315 of the Communications Act, 47 U.S.C. 315; *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). Furthermore, Section 3(h) of the Communications Act (47 U.S.C. 3(h)) expressly provides that a broadcast station is not a common carrier. This freedom from a carrier's obligation to transmit everything tendered to him necessarily imposes on the broadcaster responsibility for choosing among the various programs offered to him. See also *Churchill Tabernacle* v. *Federal Communications Commission*, 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947); *Simmons* v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F. 2d 670 (1948), *cert. den.* 335 U.S. 846; *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600 (C.A. 3, 1945), *cert. den.* 327 U.S. 779 (". . . Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations").

and what the public interest requires, and the Constitution permits, in the case of calculated or reckless falsehoods concerning individuals or groups. Defamatory material, based on calculated falsehood or reckless disregard of the truth, stands on an entirely different footing with respect to the First Amendment and the public interest. Such material serves no public good, can ruin reputations and lives, and is therefore peculiarly abhorrent. It has no proper place in the operations of a public trustee. Therefore, the public interest does require that where there is a pattern of broadcasts defaming individuals and groups, based on use of source material that may be deliberately false or embody a reckless disregard of the truth—the licensee must make the judgment that the material is within reasonable bounds of accuracy and in the public interest, based upon his own study of the material sought to be broadcast and of such other material as may be necessary to make a reasoned judgment. If the material *is* based upon calculated falsehood or reckless disregard of the truth, it cannot properly be presented, consistent with the public interest. Indeed, I cannot conceive how anyone can argue that a pattern of deliberately false programming, designed to defame individuals or religious or racial groups, can be said to serve the "public interest in the larger and more effective use of radio" (Section 303(g) of the Act).

The Supreme Court has made clear that calculated or reckless falsehoods concerning individuals or religious or other groups have no constitutional protection. In *Garrison* v. *Louisiana*, 379 U.S. 64, a case involving the alleged defamation of public officials, an area where the Court has been most careful to preserve the freedom to criticize government, the Court stated at p. 75:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech,

it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

In addition to this clear statement, it is relevant to note the the Supreme Court in 1952 sustained the validity of a state statute making it a crime to distribute a publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . ." *Beauharnais* v. *Illinois,* 343 U.S. 250.

Since the material here broadcast by KTYM over a period of several months was patently defamatory, Mr. Williams had the duty on his own initiative to inquire into

the truthfulness of the source material. He could have asked the commentator for his sources and taken other reasonable steps to check the accuracy of asserted bases for the defamatory statements. Further, even assuming a situation where there was justification for an initial failure to inquire, there is, I believe, an absolute duty to make inquiry with respect to future material of the same nature, and from the same source, where the licensee is given notice by other parties that the material may not have a truthful base.

But the record before us demonstrates that this licensee did not inquire into the validity of the material before it was broadcast, and has no intention of doing so in the future.[8] The majority does not hold to the contrary. In short, the licensee informs the Commission that he will continue to follow a pattern of operation whereby defamatory broadcasts of this nature may, or will, be presented and that he will not concern himself with the truth or falsity of the source material used for the defamatory purpose—and the Commission responds by finding that such a pattern of operation will serve the public interest, convenience and necessity.

Let me make clear precisely what the Commission is here authorizing. Suppose that Mr. X approaches a station licensee in a small town to seek time for a series of broadcasts, explaining that he believes Mr. Y is ruining the town by maintaining brothels and bribing police officers, and he wants to give the details on the radio. The majority has told the licensee that it need be of no concern to him whether Mr. X can corroborate these very serious charges—that without making the slightest inquiry in this respect, he may present Mr. X, and simply notify Mr. Y of his opportunity to respond. Further, since the licensee

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[8] I have set forth in Appendix C what the record shows in this respect, together with the statements of the licensee on this question and my comments upon them.

need not make any inquiry, it is presumably irrelevant under the majority's view what Mr. X's response might be to any inquiry about corroboration. Thus, the licensee could present the program even though Mr. X responded that he had no corroboration and urged instead that the program would be popular, that Mr. X has a right of free speech, that Mr. X had said similar things before without being sued, and that the licensee should let Mr. Y answer instead of censoring Mr. X. Further, even where the licensee is told of very subtantial questions concerning the truth of the charges, he can continue to present such programming without making the slightest inquiry. I simply do not see how anyone can seriously contend that this is responsible licensee conduct, or that such a pattern of operation is in the public interest.

Further, the majority decision does not advance the general public's right of free speech. Every licensee is in fact a censor with the power to deny others the use of the airwaves to express their views; only an unlimited supply of frequencies or of time could make it possible for everyone to have his say—in effect making broadcasters common carriers. The Commission's decision does not change this, and it does not expand or preserve anyone's access to the airwaves.

What the Commission's action does do is strip the present system of any rational foundation by authorizing the licensee to deny or grant the right to speak in these circumstances at his whim. If the licensee need not, but may, examine and judge what defamatory material he carries, he may say no to a Mr. X one day, and yes to another Mr. X the next day. This furthers no one's free speech. Moreover, it seems to me intolerable, for it leaves no standard to gauge the licensee's execution of his trusteeship. No licensee can possibly (or, of course, should) say yes to every Mr. X without checking Mr. X's material.

Even KTYM does not quite contend that that is its policy. Then on what basis does KTYM decide whether

to check first, or to permit Mr. X to go ahead, truthful or not, and let Mr. Y answer if he can? The only correct approach is for the licensee to check such material in every situation before he uses it, or else not permit it to be broadcast. The alternatives are either mindless, arbitrary decisions as to who shall speak and what the public shall hear, or else dishonest ones dependent upon the licensee's personal views.

Finally, I shall comment briefly with the licensee's defenses.[9] The licensee's main standard of decision is that his responsibility ends with affording time to one who disagrees with matter he has presented. In effect, the li-

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[9] Since Section 315 of the Act is inapplicable because no appearance of a candidate for public office was involved, the alleged political aura of the broadcasts did not relieve the licensee of his responsibility. Nor did the receipt of letters indicating that many listeners liked the programs excuse his failure to make a judgment—there is probably a substantial audience for obscene programming. The suggestion that Mr. Cotten must be accurate and responsible because he had not been "stopped" in court is, in the circumstances, clearly insubstantial in the context of the concept of licensee responsibility. Neither is it reasonable to assume, as Mr. Williams does (Response of December 3, 1965, p. 5; Response filed February 7, 1966, p. 54), that one who is slandered or libeled always sues. In fact, this remedy affords very little protection in many situations—a fact known to all too many polemicists. In any event, the licensee's special statutory responsibility to operate in the public interest in the broadcast field is not met by reference to private law remedies. Nor could the station disclaim responsibility by suggesting that Cotten has a constitutional right to use KTYM, no matter what he says. No right of Cotten's is abridged by the exercise of an informed judgment by the station not to afford him time. As the Court said in *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d at 600-601, "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum." No one has a right to time for the presentation of his views over a broadcast station unless (i) he is a candidate for public office whose opponent has been permitted to use the station, or (ii) he has been personally attacked over the station.

censee is claiming the right to stand aside—to present a series of programs which, for all he knows, irresponsibly purport to link a religious group to Communism and an individual to a Communist spy ring, and to do so without bringing to bear his own judgment, on the ground that if complaint is made, he will afford time to answer. I do not believe a licensee can force upon an individual or a group the obligation to respond to an attack which, if he had discharged his responsibilities, would never have been broadcast. This position misconceives the Congressional scheme and ignores the public interest. In light of the principles set forth above, and the nature of the material, what was required here was the licensee's own judgment that the series of broadcasts were not based on inaccurate or misleading source material and that they constituted programming "in the public interest." (*Regents of New Mexico* v. *Albuquerque Broadcasting Co., supra.*) To determine this may be a burden, but if so, it is the burden accepted by a broadcast licensee when he accepts his public trust.

A licensee may not accept the great power of choice his license confers upon him and simultaneously deny it any meaning. Every licensee, Mr. Williams included, accepts some material and rejects other. When a program is carried, a choice has been made just as surely as if the program had been rejected. When the material is of the sort we are dealing with here, the requirement that the choice be the licensee's, and that it rest upon his own informed judgment, is the necessary heart of a licensing system under which a Federal agency places in a perilously few hands the tremendous power to determine who shall speak on radio and television and who shall not.

3. *The use of KTYM to broadcast malicious defamation*

The licensee therefore had a duty in these circumstances to make a reasonable effort to determine the truth or falsity of the source material and whether presentation of the pro-

grams was in the public interest. If, upon the exercise of his responsibility, he found that the programs were based on the use of calculated or reckless falsehoods, they could not be presented, consistent with his statutory duty to operate in the public interest. It is, I think, axiomatic that a pattern of broadcasts of calculated or reckless falsehoods concerning individuals or groups is not in the public interest.

Since the licensee here did not exercise his responsibility, and has indicated that he would not do so in the future, the threshold and critical issue in this case is the failure of the licensee of KTYM to exercise proper responsibility for the use of his station. Accordingly, it is not necessary to reach the question whether, had he examined into the truthfulness of the defamatory material being broadcast and determined that it should be presented, the resulting pattern of operation would be consistent with the public interest. The majority, however, has ignored the question of licensee responsibility and has simply found that the broadcasts in question can be presented to promote ". . . free speech on all subjects . . ." This holding cannot be made on the record before us or in light of pertinent public interest and Constitutional considerations.

While the matter can only be resolved by hearing, the record before us, at the very least, raises substantial questions whether these broadcasts do not defame an individual and a religious group through the use of deliberate lies or reckless disregard of the truth or falsity of the statements made. Granted that the licensee has great leeway to make reasonable judgments in this area, we cannot say, on the material before us, that a pattern of broadcasts of this nature could reasonably be presented in the public interest.

I believe it important to go over some pertinent facts as to the present record, for that record squarely presents the question of whether the licensee of KTYM proposes to continue a pattern of broadcasts of falsehoods which are

either deliberate or reckless against individuals or religious groups. Thus, he has now received from Mr. Cotten in January of this year a letter concerning the Rabbi Wise quotation, in which Cotten, while giving other reasons for his belief that Rabbi Wise was a Socialist, fails to give any purported source for the statement attributed to Rabbi Wise in the broadcasts. This statement therefore appears to have been made up out of the whole cloth.

Mr. Cotten also deceived his audiences in his use of the Zangwill book, by palming off the statements of a character in the book as the direct statements of Zangwill himself. This was done on the January 6, 1965 broadcast in two ways. It was done first by a deceptive reading of the quotations from "Children of the Ghetto." Cotten first described Zangwill as a poet and then read what "the poet" had said, giving the impression of direct exposition of views by Zangwill. The truth is that "the poet" who made the statements was a fictional character called "the poet" in the novel, and, indeed, a character who, I am told, is treated contemptuously by Zangwill. However, since the broadcast mentioned no poet other than Zangwill, no KTYM listener was likely to realize this. The same erroneous impression was given later in the same broadcast, when Cotten told his audience to remember "the thinking indicated by Israel Zangwill, Socialism is Judaism and Judaism is Socialism, and a bit further, 'My brothers, how can we keep Judaism in a land where there is no Socialism?' " This immediately follows his statement that "Communism and socialism are one." The next day, Cotten similarly misused the same material, stating: "We quoted the famous jewish poet, Israel Zangwill who seemingly revealed that he deemed it impossible to 'keep Judaism' in a land where there was no 'socialism' ! ! Now personally I believe this is pretty near the 'root of the matter.' "

The use of the quotations from *Jewish Voice* and *Jewish Life*, whose significance to his theme Cotten strongly emphasized, also clearly raises a question of good faith. The

ADL claims that these publications, probably long since defunct, were Communist publications whose views were not representative of Jews generally. That this is so is apparently recognized even by Mr. Williams himself. In a letter of January 18, 1965 to Mr. Cotten, after the broadcasts in question, he indicated that he had mentioned the ADL complaint to Cotten three days earlier, and again mentioned to Cotten the ADL complaint and "the statement that a quotation from the Jewish World[10] (a Communist publication which they abhor), taken by itself on a later broadcast, might lead the average listener into thinking it is representative of Jews in general." (Exh. 6, KTYM reply of December 3, 1965). There is no evidence of any reply, or that Mr. Williams pursued the matter further.

In the circumstances, it is unreasonable to find that no substantial issue is raised as to whether a pattern of operation of this nature is consistent with the public interest. The deliberate attempt has been made to defame an entire religious group through the use of material which is either patently unrepresentative, deliberately distorted, or, on the record before us, simply nonexistent. I have always believed in the fullest expression of ideas, controversial or otherwise, on and off the airwaves, and have never approved of Commission action on the basis that I found views disagreeable or that they were offensive to some listeners. What I am concerned about here is the systematic use of calculated lies broadcast to large audiences to defame an entire religious group.

No decision by any court that I know of holds that the Commission is to find such use of radio in the public interest, or beyond our reach on Constitutional grounds. No

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[10] Mr. Williams did not even give the names of the publications correctly. However, Mr. Cotten presumably knew to what he was referring.

reasonably relevant holding commands our inaction.[11] I

[11] *The Editorializing Report*, 13 F.C.C. 1246, relied upon by the majority, does not equate deliberate defamatory falsehood with controversial discussion. In fact, Paragraph 17 reads as follows:

> It must be recognized, however, that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues, does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.

In *Pacifica Foundation*, 36 F.C.C. 147, also relied upon, there was no issue of deliberate or reckless disregard of the truth. Furthermore, that decision is contrary to the majority's position in this case, since in *Pacifica* the Commission emphasized the requirement of licensee responsibility for the program content there in question.

Other relevant Supreme Court decisions are similarly consistent with the views I have expressed. *Terminiello* v. *Chicago*, 337 U.S. 1, decided before *Beauharnais*, holds only that a city may not broadly make speech a crime merely because it "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." And *New York Times Co.* v. *Sullivan*, 376 U.S. 254, does not immunize even criticism of public officials where a defamatory falsehood is made with knowledge of its falsity or reckless disregard of whether it is true or false. There is at the very least, a substantial question here, needing resolution in a hearing, of whether the licensee of KTYM has not brought himself directly within this standard. See also, *Trinity, Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, *cert. den.* 284 U.S. 685, 288 U.S. 599; *Independent Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 396, 193 F. 2d 900, *cert. den.* 344 U.S. 837.

see no social value in deliberate defamation of a religious group, and the Supreme Court has already told us in *Garrison* v. *Louisiana, supra,* that the Constitution does not protect it. But the Commission majority finds it consistent with the public interest.

I wish to make it clear that we are not concerned here with isolated good-faith mistakes in judgment, for which I would not urge denial of renewal, but with a persistent refusal to discharge the basic responsibility of a licensee and the knowing continuation of programming based on falsehood. Nor are we concerned with the entirely different situation of a licensee who presents the views of the far left or far right as part of a documentary or similar program dealing with the role of organizations and individuals espousing such views. Clearly such a program would not be in the same category as the series of broadcasts by Mr. Cotten here in question. Finally, I am not saying that none of Mr. Cotten's programs should be carried by broadcast stations. I have confined myself to particular elements in the specific broadcasts about which complaint has been made. The ADL specifically states that it raises no question as to Mr. Cotten's broadcast views on a variety of other issues. My opinion is limited to the facts of this case, and it would be unwise to speculate as to what might be sound policy in other situations.

I have limited my holding to the facts of this case, and so presumably has the majority. But even as so limited, let no one be deceived as to the importance of the action taken by the majority. It is, in the circumstances, a major step away from the concept of licensee responsibility so central to the scheme of the Act. In light of the history of the world in our century, these programs stand as a bald attack upon the lives, the fortunes and the sacred honor of millions of our fellow countrymen. The Communications Act does not permit a grant without hearing when substantial public interest questions are raised. I dissent from the grant of a renewal of license to Station KTYM and vote to set the renewal application for hearing.

APPENDIX A TO DISSENTING STATEMENT OF COMMISSIONER COX

The Answer to the Commission's Question About KTYM's Power To Censor

KTYM is gratified that it has the opportunity to express its feelings in this regard. KTYM in its approach to censorship recognizes and interprets five separate guidelines.

(1) *The First Amendment to the Constitution:* "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

KTYM recognizes this law as one of the keystones of our way of life, and reads into the first amendment, into especially that portion—". . . Congress shall make no law . . . . abridging the freedom of speech. . . ." the interpretation that any creature of Congress, which makes laws, cannot make any law which will abridge freedom of speech. On a personal level, KTYM therefore treats the right, which KTYM has as an individual, much in the light of the supreme law of the land. KTYM as a licensee recognizes that it has a right to accept or reject programs, but KTYM exercises that right with great restraint, and certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are specific to its own personal self-interest, regardless how magnanimously it announces its objectives.

(2) *The Statement of Commissioner Lovinger, of the Federal Communications Commission,* who said in essence:

"Freedom of speech does not mean letting a man voice only that with which we agree, but means letting him voice that which is entirely loathesome to us. . . . ."

Taking its cue from one of the heads of the Federal Communications Commission, KTYM again chooses to exercise its right to censorship with great restraint, and again, certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are specific to its own personal self-interest, regardless of how magnanimously it announces its objectives.

(3) *Section 315 of the Communications Act of 1934, Title 47, Ch. 5, U.S.C.A.:* Which law states in part:

> "such licensee shall have not [sic] power of censorship over material broadcast under the provision of this section."

This part of the Communications Act applies to programs broadcasting on behalf of qualified candidates for public office.

In cooperation with the intent of the law, KTYM will consider (and especially around election time) certain broadcasts to be ones ". . . on behalf of a qualified candidate . . ." even when the name of the candidate is not spelled out. There is obvious reason why the names of the candidates are not spelled out when certain tax-free foundations "support" a candidate. If the foundation were to openly endorse a particular candidate, the foundation would stand a chance to lose its tax-free status. KTYM is not in the business of writing or interpreting Internal Revenue Service precedent, but the management of KTYM is not so naive as to recognize the presence of political views or pressure when couched in the name of high-sounding zealots.

KTYM has broadcast the voices of Mr. Eisenhower, Mr. Kennedy, Mr. Johnson. Though KTYM obviously cannot side with two divergent views at the same time, KTYM

would silence neither. In good conscience, then KTYM always thinks a long time before it censors an uncomfortable view, and again, certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are, on occasions, unmistakably political, though they are paraded under a neutral pious cloak.

(4) *The personal feelings of the licensee with regard to censorship.*

The licensee was brought up in a home where Czechoslovak was spoken, and has complete command of that language. Two years ago the licensee, while visiting communist Czechoslovakia, was capable of being assimilated into the country as few other Americans have had the opportunity. The communist way of life, at best, is quite unpalatable. The lack of amenities are annoying, but tolerable. But towering above all the other irritation was the restriction placed on free speech. This was the one facet of communist existence which was entirely and utterly intolerable—to the natives and especially to the licensee.

The privilege to speak freely is one of the sweetest gifts of freedom. Though the privilege to speak freely has built into it the possibility of much abuse, and may most certainly breed inequities—on balance the benefits far outweigh the abuses and inequities.

The licensee would not enjoy living in a world proposed by certain elements of our society, if he were not permitted to voice an objection. Without doubt, the opposing viewpoints must feel the same way. For this reason KTYM treads very gingerly whenever censorship is considered, and to repeat, does not intend to respond to the prodding of a group of paid professionals whose viewpoint, apparently is to silence the opposition, without making

an attempt to reply to or to take a stand in the Courts against ". . . defamatory and untrue attack on the Anti-Defamation League and some of its principal officers and staff. . . . ."

(5) *The Fairness Doctrine:*

Without being precisely legal about it, there is one facet of the Communications law which requires a licensee to offer opportunity for an "injured" party to reply. Assuming that the "injured" party chooses to reply, the licensee has theoretical discretion to reject the broadcast. But in its naked essence, the fairness doctrine requires that an opposing view *must be aired in some way*—whether the licensee likes it or not. This, then is forced censorship in reverse. To this the licensee does not object, inasmuch as he believes that both sides of a controversy should and must be heard: ". . . . regardless how loathesome the opposing viewpoint. . . . ."

But to determine what is in fact "an attack", the licensee is at a loss. KTYM considers it patently unfair to ask any man who is not a member of a particular organization which may be dedicated to fostering its own particular brand of prejudices as against the prejudices of other people and organizations to develop the same sensitivity to "criticism" of the precepts of the offended organization, as would the members of that offended organization.

Protestants do not respond to the same remarks as Catholics. Democrats do not object to Mr. Goldwater being branded "trigger-happy". Republicans do not object to Mr. Johnson being called an "arm-twister". Each individual and each organization has its own sensitivities, and these are tied up with the basic fears, insecurities, and bias of the individuals making up the group. Where in the United States an individual might shrug off the criti-

cism of his neighbors, the individual under different conditions in a foreign country may be worried, apprehensive, or even frightened by the same criticism when he is in the minority. Where in the United States he may be mildly irritated, under other circumstances he might be violently afraid. Thus, being "attacked" is a subjective thing. Consensus on what constitutes attack is a myth. There are as many shades of opinion as there are people.

Seek to make your viewpoint or sensitivity preeminent over your fellows; and you are in danger of his doing the same thing. Feel that your opinion is more holy; and our opponent may succeed in forcing his brand of holiness upon you.

In view of the foregoing, the writer, as licensee of KTYM feels an august and awesome duty to be discharged, whenever he has to solemnly say to an individual: "You cannot go on the air". See bottom of KTYM contract, *Exhibit No. 19.* See also Affidavit for United Jewish Welfare broadcasts on KTYM. *Exhibit No. 20.*

ALBERT JOHN WILLIAMS

for

Trans-America Broadcast Corp.
KTYM-AM—Inglewood, Calif.

APPENDIX B TO DISSENTING STATEMENT OF COMMISSIONER COX

Transcript of Richard Cotten Broadcast KTYM—October 7, 1964

(Music—America the Beautiful)

This is Richard Cotten, spokesman for the Committee of Christian Laymen of Kern County, California and wholly dedicated to exposing Socialism, CommUNism, one-worldism and any other form of totalitarianism that is undermining our way of life. We are for individual responsibility, for a return to constitutional government, for less centralization of power, for states' rights and we are for exposing the Federal Reserve. We are for the sovereignty of the United States of America and are unalterably opposed to any plan to surrender our God-given Republic to any form of totalitarian rule. Now, won't you join us and take one more look at the ever-increasing evidence that we are indeed being surrendered to a one-world government.

(Music ends)

Our previous program dealt in detail with the newly organized Council for Civil Responsibility and their intent to do great harm to the ultra Conservative. Today, I will mention another group. It will be B'nai B'rith's Anti-Defamation League. I will be treading on forbidden territory. By some unwritten rule, it is not considered the thing to do to criticize this organization or indeed to criticize anything having to do with the Jew. May I make myself clear? Even as the National Council of Churches does not speak for all Christians, so also, the Anti-Defamation League does not speak for all Jews. I'm about to draw upon an extensive article in the Fresno Bee, Saturday, September 19, wherein the Anti-Defamation League is organizing a campaign to expose the same groups that we outlined yesterday in our program relative to the so-called Council for Civil Responsibility. Surely, one should have

a right to defend oneself. The close of the article, in speaking of the Anti-Defamation League, states as follows:

> "The Anti-Defamation League, founded in 1913, is a Jewish organization formed specifically to combat anti-Semitism and to quote 'secure justice and fair treatment for all citizens.'" unquote.

I am well aware this sounds reasonable, but may I add two quotes. The New York publication, *Jewish Voice*, July and August of 1941, page 23, states as follows: "Anti-Communism is anti-Semitism." Another quote, this from the publication *Jewish Life*, also New York, "Scratch a professional anti-Communist and you will find an anti-Semite." Now, I have probably never brought you any single message more important than the preceding. "Anti-Communism is anti-Semitism," and "Scratch a professional anti-Communist and you will find an anti-Semite." Where do we go from here? Do we bow our necks because of the smear or do we do the best we can to expose those who would subvert our Constitution, our way of life and trust the facts can stand on their own two feet? I know not what course you choose to follow, but for me, I choose the latter. If Dan Smoot, and the Church League of America and the Conservative Society of America and similar groups are to be considered Radical Right by the ADL, then surely the voice of the right should be free to speak for itself.

Let's get back to my newspaper article. We learn that the ADL considers the Radical Right a growing threat to democracy and the nation. Good. We don't live in a democracy, and finally, some of us are finding it out. Next, Dore Schary, I guess it is, producer and playwright, who is the League's National Chairman, said the "Radical Right is a magnet for bigots, rejects the traditional tolerance of our two-party system and tends to see history as a conspiracy of evil and faithless men," and I say, 'So be it.' Yes, there is a conspiracy and it is as old as time, and

it is openly and avowedly anti-Christian. As for the two-party system, the conservative is fighting for nothing more than a return to constitutional government, a government of law. As for the magnet for bigots, what is his definition of a bigot? Is it a person with racial pride and integrity? And it is not by chance that the word bigot rhymes with maggot, and it is intended to leave an unpleasant connotation.

The article then advises that a document that has been in preparation for four years and should not be considered an attack on the Republican Party or its presidential candidate is about to be published. The report, entitled "Danger on the Right," was written by a man who Mr. Schary called Arnold Forster, who happens to be the ADL's legal counsel.

Now, in the *Congressional Record*, on the date of October 20th, of '51, in an article relating to how "Communist spies misuse committees of Congress," Representative Clare Hoffman of Michigan in the House of Representatives denounced a plot to suppress campaign against Communism. He read sworn charges and promised to fight un-American treatment of Joseph P. Kamp in the interest of justice and fair play. And he told how the Red smear influenced the jury. A part of the sworn testimony to which this refers was a letter from Mr. Kamp to the United States government wherein he outlined specific charges. I will read three paragraphs verbatim.

> "Three months ago the Anti-Defamation League of B'nai B'rith issued its annual report in the form of a smear book which made violent and vicious false attack against the leading movements fighting Communism in the United States. The book, 'A Measure of Freedom,' was plugged day after day by Walter Winchell.
>
> "The author of the book and the chief director of ADL is a man who calls himself Arnold Forster. If you

can get President Truman to let you look at the FBI files, you will discover that Forster's right name is Fastenburg and that he was a member of the Communist spy ring."

Now that seems to me to be highly relevant. If the allegation is correct, one should be so advised as he pursues the ADL's new volume. The book that Mr. Kamp alludes to is quite a book. It is interesting to find the organizations that they consider as anti-Semitic. It includes Upton Close and Merwin K. Hart of the National Economic Council. It includes an endless listing of organizations which include in their titles the word "Christian." As you know, we include both the publications, "Closer Up," which is the outgrowth of Upton Close's work, and the National Economic Council Newsletter on our list of vital publications.

Merwin K. Hart passed away just a few months ago, universally loved and respected in knowledgeable conservative circles. It is disturbing to find patriots labelled in this fashion. If your library has the volume, *A Measure of Freedom*, I would commend it to your persual (sic). It will serve as an excellent background for the pending "Danger on the Right" written by the same author.

So now comes the problem. I want you to learn a great deal in this area, and radio has its limitations. However, politics are in the air and I believe I have a solution. First of all, you should know more about Joseph P. Kamp and his trials and tribulations. He went to jail for you. Yes, he did. Pressured by infiltrated congressional committees, he refused to reveal the names of his supporters. He was jailed for contempt, and the ADL took the credit.

All right. That's history, but if he was wrong, you should know it, and if he was a hero, he's entitled to recognition, and I think we'll let you be the judge.

Recently the organization that published Mr. Kamp's booklets came out with one that is very revealing. It is

entitled "Why Goldwater Must Be Destroyed" and it will make "Choice Not An Echo" look like a middle-of-the-roader. The pamphlet gets to the root of the problem. You are going to be besieged with "Danger on the Right." Possibly this will give you some helpful answers. It is said, "A word to the wise is sufficient." I assure you this is powerful ammunition, and if you get this booklet, it will include a little list of other booklets available. One of these, "The Bigots Behind The Swastika Spree," is absolutely a classic.

Now, the ADL or Anti-Defamation League does not like Joseph Kamp, and, in fact, they call him a jail bird, but you be the judge. Send for this booklet; we will get it for you to see.

Now, what I've just done is this: I will be labelled an anti-Semite for having mentioned the ADL and especially for having something good to say about Joseph P. Kamp and his material. So be it. The bugaboo of not being able to comment upon smears by Jewish organizations simply is getting old fashioned. And when the ADL openly attacks the conservative movement, it is high time you were given enough information as to make an intelligent decision. I might mention another excellent pamphlet distributed by the same organization. "Catholics, Communism and The Commonweal" has a wealth of information.

For those who would like to criticize things Catholic, this will show Communistic control over one of their publications. And adversely, it will show the Christian devotion and loyal patriotism of the author, an Irish Catholic named Brophy.

Anyhow, let's show a little courage. Joseph Kamp's writings fill a needed niche, and he knows a lot about those who must destroy Goldwater. No matter what other books you have read on the political picture, until you read this pamphlet, you have not a rounded picture, in fact have been kept in almost total ignorance. I would also commend to your reading the entire eight page article from the

Congressional Record. I am not in a position to reproduce it at this moment, but copies of our broadcast will give sufficient information for identification.

Now, let's go back over this slowly. "Anti-Communism is anti-Semitism." So spoke the Jewish publication, *Jewish Voice,* and "Scratch a professional anti-Communist and you will find an anti-Semite." Thus spoke the *Jewish Life,* also a New York Jewish publication.

My friends, what does this tell you? It is very simple. Simply that the smear word "anti-Semite" is the means of destroying any right wing movement. It has always been thus and always will be. Being fully informed is your only protection. Some time ago, I did a program entitled "Anti-Semitism" and if you send for this broadcast, we will include that documentation. In it I endeavor to make it clear that it is not I who interject the Jewish issue but an organization, in this instance, the ADL attacks the Conservative movement and I am supposed to be immobilized by fear. I simply won't have it.

It was the eminent authority, Rabbi Stephen Wise, founder of the political, political powerful—excuse me—of the powerful political American Jewish Congress in 1935, who said "Some call it Marxism but I call it Judaism." Now, it's a free country. Or, at least, it has been. But if I am going to fight Marxism and some deem that to be an attack upon Judaism, then it is obvious that I will end up smeared with anti-Semitism. Were there time, I could give you some pretty remarkable for instances, but I simply do not have time right now.

If you will please stay with us, I will be back after one minute with our announcer.

(Announcer—not identified)

You are listening to a miracle, the miracle of the American way of life. The very fact that Richard B. Cotten is heard on this station is an evidence that there still is some freedom left in the United States. How long this freedom will remain is in real question now. If the current trend

continues, Richard B. Cotten and all those who would bring you little known facts regarding the conspiracy and action within our shores will be silenced. You will hear only those things your leaders, Quote—Unquote, want you to hear. The encouraging thing is that you still can control this situation. But the time is late and frankly, Mr. Cotten needs to hear from you in a financial way right now. We do not apologize for this request because your sacrificial gifts are the only means we have of staying on this station. We need a number of very generous investors. But if you can only give very little, please do what you can. The smallest gift, when multiplied by the thousands of listeners to this broadcast, can accomplish great things. The important thing is not to wait. Do it right now. Next week, next month, next year may be too late. Address that investment to: Richard B. Cotten or Conservative Viewpoint, Post Office Box 1976, Bakersfield, California.

(Richard Cotten) Now, if you will send for the booklet, "Goldwater Must Be Destroyed," which will expose who's promoting and what's behind the conspiracy to get Goldwater and to discredit the conservatives, you will have a lot of light shed in many dark places. Sixty-two pages of pure dynamite and I believe that you'll agree that treason is the reason.

This is our broacast #220 or part two of "The Smear" and we will include our broadcast "Anti-Semitism." Make no mistake about it. In this land of the free, each man is entitled to his religious convictions, but let's curb the tendency to defame another man's character. Let the record speak for itself. It is certainly interesting.

Program 220, Post Office Box 1976, Bakersfield, California. We need your contributions to continue to purchase radio time. Will you make this part of your tithes and offerings.

Until tomorrow, this is Richard Cotten reminding you as always—freedom is not free, free men are not equal and equal men are not free. God bless you.

RICHARD COTTEN'S

CONSERVATIVE VIEWPOINT

Post Office Box 1976

Bakersfield, California

"Freedom is not free, free men are not equal,
and equal men are not free" ! !

Presenting:

WHO OR WHAT DOES
THE A. D. L. REPRESENT?

Vol. 3, Nos. 5, 6 & 7
January 6, 7 & 8, 1965

IN TIMES OF NATIONAL EMERGENCY, SILENCE ISN'T GOLDEN, IT'S YELLOW !

"So because thou art neither cold nor hot,
I will spue thee out of my mouth" (Rev. 3:16)

Some little time ago I brought you a program entitled "Anti-Semitism". At a later date I brought a three day program which I entitled "The Smear". Both dealt with what is basically the same problem. The effort on the part of some groups or organizations to discredit the American who endeavors to defend "our way of life" and believes that this is a Christian Constitutional Republic. Now the fight is well out in the open.

A few words are necessary before I get involved in the subject. It has been said, "none but a Jew dare criticize a Jew", I personally don't believe it. But irrespective, what I am about to deal with is an ORGANIZATION, or rather in this instance, TWO ORGANIZATIONS, both of whom claim to speak for the Jewish People. I don't believe they necessarily do. There is a parallel in the work of the NATIONAL COUNCIL OF CHURCHES, a socialistically minded organization if I ever saw one, who masquerade as the VOICE OF AMERICAN PROTESTANTISM. Just as

this organization in no wise reflect the opinion of the fundamental, bible believing, God fearing, patriotic Christian, so too I hope to find, so too do these two organizations I am about to mention do not reflect the opinion of all the Jewish community. Far from it. But a very real problem exists, and we are about to speak on one or more facets of it.

Also before I get well started, let it be said that all of the principal Conservative Organizations in America, are finding themselves under attack by the ANTI DEFAMATION LEAGUE and its agents. It is both "unChristian" and immoral to expect the right wing not to explain its position.

To my knowledge the position of the ADL is now being challenged by something like a bakers dozen of the conservative organizations. I will be bringing you quotes from COUNTERATTACK which is a very valuable publication put out by a group headed by ex-FBI men who plan to see us continue under a "Republican" form of government. Dr. McIntire is carrying on what threatens to become a running battle. The COUNCILOR had taken a mighty swing as has the CHURCH LEAGUE OF AMERICA. The FREEDOM PRESS, THE PAUL REVERE YEOMAN ASSOCIATES, THE CANADIAN INTELLIGENCE SERVICE, JOSEPH P. KAMPE'S HEADLINE PAMPHLETS and many others are realizing this information must be gotten to the public. I say good and more power to them. Mind you, this is not a "religious" issue!! It is the ADL (the anti-defamation league) who would have you think so. Frankly, as I hope to develop, it is a matter of the objectives of the organization. So, from this point on, what I have to say will be, as the saying goes, nothing but solid documentation. Wish me well, there is no point in the entire battle for the Republic more in need of clarification.

The immediate reason for this program, which I do in an effort to show that we must resist all efforts toward "world government", centered in a news clipping some

two or three weeks ago: I quote, "(headline) JEWISH CONGRESS PLANS TO FIGHT "radical right", then the article, UP Wire Service, dateline Chicago: "The American Jewish Congress, (AJC) has started a nationwide campaign to counter what it calls programs of "smear and intimidation" sponsored by extremist groups. C. Irving Dwork, national secretary of the congress, told the organization's National Governing Council Sunday that right wing activities have increased since election day. Dwork said the American Jewish Congress campaign would directly attempt to discourage contributions to ultra-rightists groups from corporations, foundations and wealthy individuals." Unquote, end of article, now isn't that something. That's really bringing it right out in the open!! A group that purposes to represent a large segment of American Jewry plans to try to cut off the money to "ultra right" groups, by directly approaching corporations, foundations, and wealthy individuals!! Mind you, it isn't anything about communism that they want cut off, just the "ultra rightist" organizations. Well, it should be allowed that the "ultra rightist" make a reply to their "smear and intimidation" accusation.

Let's go back a few weeks, last September was the date for the ANTI DEFAMATION LEAGUE declaring war on the Radical Right and contending that it was a THREAT TO THE UNITED STATES OF AMERICA! This report included such groups as the Christian anti-Communism Crusade, the national Education Program, Facts forum and the Dan Smoot Report, the Church League of America and the Conservative Society of America. It describes as extreme conservatives the Americans for Constitutional Action, the Young Americans for Freedom and the magazine, the National Review among others. This too is deserving of an answer.

My friends, what these organizations have in common is an all out commitment toward the preservation of the Republic, the United States of America. What they all

have in common is a firm resolve to expose SOCIALISM as a threat to our national survival. Now if this contention is correct, how long is America going to stand for an organization which labels patriots as anti-semites and bigots for trying to preserve "our way of life" which is, of course, Freedom under God, States Rights, individual responsibility, and a Republican form of Government!! So now as the saying goes, from the horses mouth no less, let us see if this isn't the heart of the matter.

Probably as kind a starting place as any would be to quote from the writings of the Jewish Poet and leader, Israel Zangwill, wherein he was addressing the "Children of the Ghetto" as the volume was called, or the English Jewish community back at the turn of the century. Mind you, Zangwill is not only a leader but is also known for his early support of the Zionist movement. (He later separated from them when they insisted upon a return to Jerusalem rather than an other area that Zangwill deemed suitable.) Listen closely to the by-play as he, the poet, addresses victims of a "sweater factory" where undoubtedly there were existent sweat shop conditions: "Brethren in exile," said the poet. "The hour has come for laying the sweater low. Singly we are sand-grains, together we are the simoom Our great teacher, Moses, was the first Socialist. The legislation of the Old Testament—the land laws, the jubilee regulations, the tender care for the poor, the subordination of the rights of property to the interests of the working men—all this is pure Socialism!"

The poet paused for the cheers which came in a mighty volume. Few of those present knew what Socialism was, but all knew the word as a shibboleth of salvation from sweaters. Socialism meant shorter hours and higher wages and was obtainable by marching with banners and brass bands—what need to inquire further?

"In short", pursued the poet, "Socialism is Judaism and Judaism is Socialism, and Karl Marx and Lassalle, the

founders of Socialism, were Jews. Judaism does not bother with the next world. It says, Eat, drink and be satisfied and thank the Lord, thy God who brought thee out of Egypt from the land of bondage." But we have nothing to drink, we have nothing to be satisfied with, we are still in the land of bondage." (Cheers.) "My brothers, how can we keep Judaism in a land where there is no Socialism? We must become better Jews, we must bring on Socialism for the period of Socialism on earth and of peace and plenty and brotherly love is what all our prophets and great teachers meant by Messiah-times."

Now there is a great deal more in this very readable little volume but basically I think that tells the story. "My brothers, how can we keep Judaism in a land where there is no Socialism? "We must become better Jews, we must bring on Socialism". My friends, I wonder if the American Jewish Congress, and the ANTI DEFAMATION LEAGUE OF AMERICA would be so kind as to openly allow that their grievance with the "radical right" is that it is blocking any and all efforts by any group or organization, to "bring on socialism?" No matter how thin you slice it, only in this explanation can you find the answer to why these organizations are death of "conservatives" but don't waste any time fighting communism.!!! It was of course the eminent authority, Rabbi Stephen Wise who is quoted as having said, "some call it martism, I call it Judaism."

Let's take a moment and take inventory and see just where we are, we who term ourselves "conservatives" in America.

First, last and always, we believe in "Freedom of Speech" in America. We do not believe any organization has a right to advocate the overthrow of the government. And the government is a Constitutional Republic, each of the several states being guaranteed a "Republican Form of Government."

Now religiously speaking, there should be room for all beliefs in America. But the end result should be obvious to the most unthinking persons, if one organization is going to take political action, as in the case of the AMERICAN JEWISH CONGRESS AND THE ANTI DEFAMATION LEAGUE OF AMERICA, and another group refuse to "mix in politics" as does the fundamental Christian church in America. It would be interesting to study the development of that particular suicidal doctrine.

I have been studying an amazing little booklet. It is entitled "I Testify" and the author is Robert Edward Edmondson, now deceased, but in his day a very capable newspaperman. In his day he had quite a run in with the American Jewish Congress and was even held for trial by the then mayor of New York, LaGuardia. The mayor resisted all efforts to bring the case to fair trial and when it proved that the advantage would rest with Mr. Edmondson, it was dismissed following a petition by the American Jewish Congress, back in April of 1958 so we now see history somewhat repeating itself. Edmondson made it abundantly clear in all his writings that he was in no wise attacking the Jewish community, certainly did not consider their religious beliefs to be pertitent to the case, but that he did endeavor to expose what he deemed to be an international conspiracy which appeared to have a great many Jewish adherents. And suddenly, as he fought to expose "Socialism, Communism, one worldism," he found his meager resources pitted against the American Jewish Congress and it's limitless "power of the purses". His contention was that under FALSE JEWISH LEADERSHIP, the downfall of the nation was being engineered. His documentation would appear irrefutable, certainly as we see our nation bled white to create the new nation of Israel and the land stolen from the Arabs who had occupied for literally thousands of years, it is difficult to see how our national and internation policies can long endure. Certainly we are not working toward keeping our "sover-

eignty", but rather toward a "One world", Socialistic, government. Mind you, there is no law in the land against a citizen of the Republic desiring that end, there is something inconsistent however with taking public office, swearing to uphold the constitution, and then working to socialize the government. Zionism is a political move, not a religious one. But it was Ben Gurion, premier of Israel who boldly told us, as published in the Look magazine, "within 25 years he looks for the supreme court of all mankind", to be in Israel, with all other governments subservient. He can dream, so can I, of a free America, the land of our forefathers, preserved as a heritage, for my children. America has always welcomed "oppressed minorities" to her shores but not for the purpose of altering our form of government. The entire concept of a separate nationality is alien to the American idea. Needless to say there are a great many Jews who would dearly love to have the ADL, and the AJC, stop trying to protect them. The dual citizenship claimed for the adherents of the pharisaic teachings as laid down in the Talmud, is unquestionably very trying.

May I include two quotes that I always found intriguing: The New York Publication, Jewish Voice, July, August issue, 1941, page 23: I quote, Anti-Communism is anti-semitism. And this jewel, from the Jewish Life, also New York: Scratch a professional anti-communist and you will find an anti-semite. Unquote. May I suggest you bear this in mind as you read of the ADL and the AJC declaring war on the so-called "radical right" which is, after all, trying to defend America from communism. You see, my friends, we know that Communism and socialism are one. Last that you remember also the thinking indicated by Israel Zangwill, Socialism is Judaism and Judaism is Socialism, and a bit further, "My brothers, how can we keep Judaism in a land where there is no Socialism?" Unquote, well I may not have an answer to that one, but I do believe it behooves each and every citizen of the republic, regardless of racial, ethics, or religious background, to defend the

republic against those who would try to subvert it to some form of Godless, Socialistic, One world government. I can do no less, and stand before God as I understand His purpose in my life, my allegiance to The Republic demands everything I have. It's a fine Republic, its been more than generous to all "alien minorities". It is to be regretted if the presumed leadership of such a minority declares war on those who fight to preserve our rich heritage.

Tomorrow we will continue to reveal a pattern of control between this concept and the One World organizations, the sooner you write for it the sooner you will have it and before I am through, there should be some fairly revealing quotations. Oh yes, I am not an "anti-semite", and if anyone tells you that I am, tell them their mistaken. But you can tell them this, I am a Christian, Constitutional, Conservative. Maybe they'll be honest enough to answer, well, that's the same thing! Then indeed you could say, "well that's mighty, mighty interesting!!

Until tomorrow, our post office box is Box 1976, Bakersfield, California, program #5, and this is Richard Cotten reminding you as always, freedom is not free, free men are not equal, and equal men are not free plus, it seems fitting, THIS IS A REPUBLIC, NOT A DEMOCRACY, LET'S keep it that way!! God bless you.

January 7 & 8, 1965

In starting this series of talks I stressed that it is only after both the Anti Defamation League of Bnai Brith and the American Jewish Congress have publically determined to destroy the so-called "radical right" that it was deemed wise to try to rationalize their objectives. The age-old "smear of "anti-semitism" is supposed to have sufficient power to prevent our retaliation. Thus far I have been as objective as possible, trying to ferret out the explanation as to why these two monstrously powerful organizations that purport to speak for American Jewery, are death on the "Right wing" and soft on communism. Yesterday's program endeavored to shed some light on what appears

to be the only logical conclusion. We quoted the famous jewish poet, Israel Zangwill who seemingly revealed that he deemed it impossible to "keep Judaism" in a land where there was no "socialism"!! Now personally I believe this is pretty near the "root of the matter". Copies of the broadcast are available and if either the ADL or the AJC wish to challenge the massive evidence indicating that they wish to create "socialism" I will give their rebuttal publication and then proceed to further document what appear to me to be the facts in the case, namely that these organizations see the "right wing" standing in the way of their plans to bring us under a One-world socialistic Government. Mind you, under our present laws this is a legitimate objective if they wish to pursue it. But similarily it must be presumed that I have not only the right but the moral obligation to expose the pitfalls of "socialism" and try to reveal what to me is a diabolic pattern.

Today and tomorrow I intend carefully documenting, from the words of eminent men within our government, the fact that indeed there is such a power bent upon the destruction of our two party system. Now as I do this let it be known that not less than twelve "conservative organizations" are each, in their own way, trying to educate the American public to the workings of the Anti Defamation League in America. To name a few (who deem it high time for a frontal attack upon this organization) we find Church League of America with Major Bundy, the Twentieth Century Reformation hour with Dr. Carl McIntire, The publication COUNTERATTACK published by some pretty wonderful ex-FBI men, THE COUNCILOR edited by Ned Touchstone, THE HERALD OF FREEDOM edited by Frank Capeil, and other competent, Constitutionalists, who are determined to preserve as a Republic, the United States of America. Also as many of you know, it was the infamous smear book entitled DANGERS ON THE RIGHT written for the anti-defamation league, that brought this matter to the entire "right wing's" attention. I had been exposed to the same author, a man who now calls himself

Arnold Forster wherein the same anti defamation league had used him to smear patriots back in 1950 in a volume entitled "A MEASURE OF FREEDOM". If the ADL is supposed to be the friend of the jewish community, I can only say, "who needs enemies?" Of course there is a very complex answer.

Now then, listen carefully to the words of Senator William E. Jenner of Indiana, addressing the Senate on February 23, 1954: (oh, how I wish we had some of his kind around right now) I quote:

"We have a well organized political action group in the country, determined to destroy our constitution and establish a one party state. This political action group has its own political support organizations, its own pressure groups, its own vested interest, its foothold within our government, and its own propaganda apparatus." Unquote and now let's get down to the subject. I may have to take the rest of this day's broadcast to qualify my "witness" but if so, it'll be worth it, because in my opinion none have done a better job of describing the working of the ADL and the AJC than did founder of the California Senate Fact Finding Committee on Un-American Activities, in California, Senator Jack B. Tenney. Oh, he paid the price alright, powerful forces finally defeated him, but he is now engaged in a highly successful law practice in Southern California. While he was in Sacramento, the "Tenney Committee" had the respect of law enforcement throughout the nation.

Now, if I seem ponderous please bear with me for a moment, it is presumably impossible to criticize this organization and continue on the air, I intend proving otherwise but I do want to make very clear, my position.

First item: Both the Anti Defamation League and the American Jewish Congress have publically and taken on the "right wing" which they contend is a threat to the United States of America. This unquestionably deserves an answer.

2nd item: Before someone starts calling me an "anti-semite" (a smear term if I ever heard one) let it be said that neither the ADL nor the AJC necessarily speak for all of "Jewery" any more than the National Council of Churches speaks for all of protestantism.

3rd item: I shall proceed, as the fellow said when asked how a porcupine makes love, very, very, carefully. Let it be said that I will bring you the written expression of Senator Jack B. Tenney rather than my own, and that I will first fully qualify him as to his qualifications for expressing such an opinion. Now that is the American way of doing things, no "smears", no labels, just facts, from the best possible authority.

Senator Tenney wrote several books which an obedient organization has caused to disappear from your library shelves if indeed, they ever had the courage to purchase them in the first place. Three of these books were reprinted under one cover, called the TENNEY REPORTS ON WORLD ZIONISM. One book therein is entitled "Zion's Fifth Column", another is "Zionist Network" with an introduction by Franklin Hichborn who in turn wrote wonderfully well on how "minorities control the majorities in congress", and the third book, "Zion's Trojan Horse" with an introduction by Col. John Beaty. The latter gentleman has several distinctions. One is that he authored the book, IRON CURTAIN OVER AMERICA and thereby won the everlasting hatred of the ADL, the other being that posthumously the Sovereign State of Texas by official action caused to be read into the record, a very worthy commendation. May I say that no less dignitaries than General Stratemeyer, General Almond, Admiral Crommelin, and General Del Valle recommend his book most highly. In addition, Senator William A. Langer, Chairman of the Judiciary Committee expressed the opinion that, quote, " I think it ought to be compulsory reading in every public school in America." Unquote, referring to the book IRON CURTAIN OVER AMERICA, by the

author, John Beaty who is about to bring you his opinion of the writings by Senator Jack B. Tenney that I want to share with you. If this sounds round about, there is a reason. Listen now, to his opinion of Tenney's writings:

"Ten years of arduous work in the California Senate as Chairman of the Committee on Un-American Activities has given Senator Tenney a great body of information on vital facts to which newspaper columnists and other political writers, and even academic historians, have no means of access. The reason is obvious. In his strategic position, Senator Tenney not only had opportunities denied to others for uncovering secret data; he even had the power to force the disclosure of much information which would under no circumstances have become known to a writer who was not in a similar position of government authority.

"Other authors have written books which purport to cover the history of the past half century or to deal with the foreign policy of the United States of America and yet, from fear of an alien minority, make no reference whatever to Middle East, Israel, Jews, Judaism, Khazars, or Zionism! *These books name names but never the names of* such history-making Jews as, for example, the Rothschilds, Chaim Weizman, Samuel Untermeyer, Stephen A. Wise, and Louis D. Brandeis—much less the names of those Jews prominent in more recent times in atomic espionage; in the U.S. executive departments, especially Treasury and State; and above all, in the personal staffs of the last three Presidents of the United States.

"Books that leave out such topics and such names are worse than useless. They are dangerous. They teach the reader to place the blame for the world's perilous condition upon people of his own creed and kind, and not where it belongs—upon scheming alien manipulators. Such books present a picture as much distorted from the truth as would be presented by a history of the U. S. Revolutionary War which made no reference to taxation without

representation, the Declaration of Independence, and the Continental Congress; and made no mention of Thomas Jefferson, Benjamin Franklin, John Hancock, or other men prominent at the time in influencing public opinion.

"Senator Tenney writes with a confidence and a zeal which the reader immediately senses and shares. Imbued by the emotion of the author, the reader is swept forward through the mass of details which fill the years between Karl Marx and the present. He is both fascinated and terrified by the climactic story of the growth of two tremendous forces, Communism and Zionism, so closely related in their objectives. The reader sees with the horror which can be induced only by suburb literary writing how the aims of these two forces, Communism and Zionism, are alike hostile to America as a nation and to the Christian civilization of which our nation is the finest flower. The reader shares the authors indignation at the subtle way in which Communism and Zionism have played Christian nations against each other in bloody conflict, and is appalled at the combination of subtle infiltration, brazen bullying, and ever lasting propaganda with which these two alien forces have ridden rough-shod over the world and have demanded and secured in this country rights and privileges which involve the destruction of America and the degradiation of the Christian West. Jack Tenney has written of the fall of American man, and of American women, too, under the blandishments, the bribes, and the intimidation of alien intruders into the garden spot, America. To read this great book is to arm yourself with knowledge. With your increased knowledge you will feel increased confidence and have a new power to go forth and defend your country, your ideals, and your faith. Signed Colonel John Beaty.

Both the ADL and the AJC have declared war on what they term the "radical right", the "lunatic fringe", etc. Their motives must be brought to America's attention. The best qualified voice I know of, is the voice of Senator

Jack B. Tenney of the California Senate Fact Finding Committee on Unamerican activities, a committee which in fact was called the Tenney Committee, for years after it was formed, thanks to his efforts. He is now out of politics, thanks to the "smear" but is a successful trial lawyer in Southern California. I have spent most of this program qualifying him to bring you from his writings, his opinion of the ADL and the AJC. As he will point out, Jewish groups such as the American Council for Judaism who oppose the un-American activities of the Zionists and their agencies, receive scant publicity through the ordinary channels of communication. Let's have that clearly understood, he is going to talk not about a race, or religion, but about certain organizations and their objectives. As I said in prefacing this entire matter, if we can establish that the objective of the ADL and the AJC is world "socialism", then it stands clearly revealed that I have a right to criticize them as they attempt to "destroy the radical right", particularly as I do believe the matter resolves itself not around a racial or religious question, but around a question of those who want socialism, and those who want to retain or regain, our Christian, Constitutional Government. Free speech is indicated, the question is will the "power to smear", destroy this fair exchange of ideas. It is not against the law to advocate socialism. It would appear to me to be inconsistent to hold public office wherein one swore allegiance to the flag and the Republic for which it stands, or who swore to defend the constitution.

Not at the same time one is bent upon achieving the results necessary for a one-world socialistic government. In due course this too will be resolved, but not if we allow fear and intimidation to destroy the voice of conservatism.

I bring you Senator Jack B. Tenney's comments on both the ADL and the American Jewish Congress. I assure you, it is impossible to evaluate current happenings without the information furnished in the writings of Jack B. Tenny, our former California Senator.

APPENDIX C TO DISSENTING STATEMENT OF COMMISSIONER COX

The Record on the Licensee's Exercise of Responsibility

The record establishes the following:

(i) Prior to broadcast Mr. Williams had the October 7, 1964 tape auditioned. This broadcast, *inter alia,* linked Judaism with Marxism on the basis of the quotations from Rabbi Wise, *Jewish Voice* and *Jewish Life;* and, on the Authority of the Kamp letter, also referred to ADL's General Counsel Forster as a former member of a Communist spy ring. Despite the patently defamatory nature of the charges, the licensee has given no indication that he investigated or made any affirmative effort to evaluate the charges in that broacast prior to its presentation.[1]

(ii) That broadcast occasioned the first complaint by ADL on the same day, at which time they requested a copy of the script because of the derogatory remarks about the organization and its General Counsel. The licensee still assumed no affirmative responsibility and presented the subsequent broadcasts

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[1] Even his later inquiries were sketchy, were directed only to Mr. Cotten, and were dropped upon the receipt of responses that were far from satisfactory. Thus when asked about the purported quotation from Rabbi Wise (but only after it had been broadcast twice, and after the Commission's inquiry had begun) Mr. Cotten (1) referred to alleged Communist activities of Rabbi Wise, without documentation; (2) cited the *New York Times* for a completely different statement; (3) quotes from another Rabbi who is mentioned in a publication allegedly issued by Rabbi Wise; and (4) then launched into a discussion of sources indicating that Jews have been active in the Socialist Movement. *Nowhere does he suggest any source for the alleged quotation from Rabbi Wise,* but Mr. Williams did not pursue the matter further—either with Mr. Cotten or with independent authorities. Instead of investigating Mr. Cotten's charges, Mr. Williams hints that he has investigated the ADL and says that it "fared considerably worse than Cotten." Response filed February 7, 1966, pp. 21, 55.

which repeated and amplified the charges. At a meeting of January 14, 1965 with ADL representatives, after the presentation of these broadcasts, according to the affidavit of one of them (Exhibit C to the ADL response of January 13, 1966, pp. 3-7) Mr. Williams said that "he was in no position to judge the accuracy of the many statements broadcast over his radio station and that he could not set himself up as a censor" (p. 3); that "he had no way of judging between Richard Cotten and the ADL" (p. 7); "protested his ignorance and asked for information" (p. 7); and repeatedly used the phrase "Who am I to judge who should and who should not be allowed to broadcast?" (p. 3). In his pleadings, the licensee did not dispute that he took the foregoing position.[2]

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[2] See, also, Response of December 3, 1965, p. 6, and Exhibit 10 to that response, a letter dated April 21, 1965, from Mr. Williams to Mr. Cotten. The nearest Mr. Williams comes to demonstrating that he exercised his judgment with respect to the presentation of these programs would appear to be reflected in the following statements:

(a) "Quite objectively, from this standpoint then (referring to letters favoring Mr. Cotten's viewpoint), KTYM has decided that to remove the program of Mr. Cotten from the air, simply to please the ADL, would be in the need, necessity, and convenience of the ADL only, and this body is but a miniscule among the total public which KTYM serves." (Response of December 3, 1965, p. 12).
Comment: The issue is not the removal of Mr. Cotten's programs in general, to please the ADL or for any other reason, but whether the public interest was served by presenting programs containing grave charges against all Jews without checking the alleged authorities referred to, and will be served by a continuation of this policy of broadcasting matter of this kind without question.

(b) "But KTYM must judge whether the public interest is being served by the 'Conservative Viewpoint' program from

(iii) Finally, the licensee explains his present position as follows (Reply of KTYM filed February 7, 1966, p. 54):

KTYM in stating "Who am I to judge?" meant it to be understood by any objective person that when a commentator on KTYM spends his full time and talent to prepare a 15-minute broadcast per day (on 25-plus stations) that commentator must be reason-

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the reaction of the listening audience." (Response of December 3, 1965, p. 15).

Comment: Any judgment suggested here is not to be that of the licensee, based upon verification of the charges here in issue, but a mere reflection of the response from the station's audience. This is a clear delegation of Mr. Williams' non-delegable duties to his audience.

(c) "In each separate case or program, KTYM retains by law the right to accept or reject programs. The exercise of this right, when implemented with great restraint, and under the guidelines set forth by the writer on pages 24 through 29 of KTYM's reply of December 5, constitutes a basis for 'quasi-censorship', if the ADL so persists. This is a right tendered to relatively few men. In the exercise of this right, a licensee cannot avoid setting himself up as a judge as to what, in his own conscience and in bald honesty, he permits or rejects. This right is so august a right that it is not exercised lightly by the licensee. Two "different licensees, faced with the same programs, might in all honesty react differently. The 'Censorship' which they exercise must be in good conscience and be applied with a velvet glove. In counterdistinction to this censorship, based on a true sensitivity to broad public responsibility, is the hard-core censorship which would be proposed by the ADL. 'Get rid of Cotten or else'—not in so many words (the ADL is too clever for that)—but by a round about method. Such censorship based on the displeasure of a pressure group is truly abhorrent. The writer refuses to engage in this kind of censorship, and has told the ADL so in its first meeting." (Response filed February 7, 1966, pp. 30-31).

Comment: The essence of a licensee's responsibility is that he should be just as careful—and, indeed, perhaps more careful—about what he puts on the air as he is about what he rejects. Mr. Williams' rationale tips the scales toward making his station a common carrier—though I doubt if

able and practical. In two years of broadcasting and of uttering lies and libel, he would have long since been discredited. KTYM in stating "Who am I to judge?" meant it understood by any objective person that when a delegation of paid professionals from a private pressure group shows up to counter what the commentator says, and expects that KTYM accept their credentials as against the commentator's —"Who am I to judge?" signifies—"if you feel you have a legitimate point in opposition, be KTYM's guest and air your view. Who am I to know that you are right?"

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he runs it that way generally. Thus he seems to say that, save in the most extreme cases, he should broadcast every program tendered to him. While I am convinced this is an abandonment of his obligations as the public trustee of his frequency, even on his basis I submit that this is an extreme case which required that he make the judgment that the charges in question were reasonably supported by valid authorities before permitting their broadcast. Instead, he persists in accusing the ADL of trying to "get rid of Cotten" because his views are displeasing to them as a "pressure group"—although the ADL has tried to make clear that it is objecting only to programs containing anti-Semitic material, and not to other programs of Mr. Cotten on other topics, though they may disagree with him on these, too. Mr. Williams should exercise his independent judgment instead of defending at all costs his claimed independence to present seriously damaging charges without making his own judgment that their broadcast would be in the public interest.

None of this can be taken, however, as a statement that Mr. Williams is ready and willing to discharge his responsibility for determining that matter such as this presented on his station, is in the public interest. Rather, he repeatedly seeks to shift that responsibility to the public, the Commission, the Courts, or even the postal authorities. Nor can it be said that the act of presenting the programs in question reflects the making of the required decision, because he is at such pains to make clear that he may well have broadcast them simply because he is reluctant to censor anyone, or feels that he is not competent to make such decisions.

APPENDIX IV

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 66-546
84886

June 17, 1966

In Reply Refer To:

Trans America Broadcasting Corporation
Radio Station KTYM
6803 West Boulevard
Inglewood, California

Gentlemen:

Reference is made to your application for renewal of license for Station KTYM, Inglewood, California, File No. BR-3611.

In an overall review of KTYM's operation, consideration has been given to a complaint filed on October 25, 1965 by the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (ADL); your response to the complaint; ADL's reply to your response; your further response of January 5, 1966; and the numerous exhibits associated with the various filings.

ADL opposes renewal of your license on the grounds that "Richard Cotten's Conservative Viewpoint" programs of October 7, 1964 and May 17, 18, 1965 on KTYM disseminated anti-Semitic material and made personal attacks on the ADL and its officers and staff.

The Cotten broadcast of October 7, 1964 contained what we believe to have been a personal attack on the ADL and its General Counsel, Mr. Forster. It was incumbent upon you to have sent them on your own initiative a transcript of the attack with an offer of time to respond. See Part E, Fairness Primer, 29 F.R. 10415, 10420-10421. It was not enough to offer time only after a complaint had been made.

It appears from the evidence before us that the other Cotten broadcasts do not contain personal attacks upon ADL or its officials. With respect to these broadcasts an

offer of adequate time to respond fulfills the legal obligation to afford a reasonable opportunity for the discussion of conflicting viewpoints. It appears that you have made such an offer to the ADL. Your obligation to afford a reasonable opportunity for the discussion of viewpoints that conflict with those of Mr. Cotten is a continuing one. The statements which you have filed with the Commission indicate that you understand this and will provide time for the presentation of such conflicting viewpoints.

We recognize that, as shown by ADL's complaint, such controversial programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. If this were the case, only the non-controversial could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the nation as a whole. (Editorialization Report, 13 FCC 1246, 1248)." See *In re Pacifica Foundation*, 36 FCC 147, 149.

We have considered the gravity of your failing to fully comply with the fairness doctrine as to the October 7, 1964 broadcast, but since it was an isolated matter, have concluded that no further action is warranted.

Upon a finding that the public interest would be served, the Commission this day granted your application for renewal of license for Station KTYM.

By Direction of the Commission

Ben F. Waple
Secretary

cc: Pacific Southwest Regional Office
Anti-Defamation League of B'nai B'rith
590 North Vermont Avenue
Los Angeles, California 90004

APPENDIX V

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

FCC 67-73
93938

In the Matter of

Complaint of Anti-Defamation
League of B'nai B'rith
Against Station KTYM,
Inglewood, California

Memorandum Opinion and Order

By the Commission:

Commissioner Cox dissenting and issuing a statement; Commissioner Loevinger concurring and issuing a statement; Commissioner Johnson not participating.

1. The Commission has before it the petition for reconsideration, filed July 15, 1966, by the Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office (ADL), directed to the Commission's action of June 17, 1966 granting without hearing the application of Trans America Broadcasting Corporation for renewal of license of KTYM, Inglewood, California.

2. The matters set forth in the petition reiterate those before the Commission when we granted the renewal. We see no reason to depart from our prior actions (see 4 FCC 2d 190; FCC 66-546), and therefore adhere to our conclusion that a renewal of license of KTYM is appropriate.

3. In doing so, we stress again two points. First, the individual Commissioners joining in this opinion have the strongest personal feelings against the views represented by the Broadcasts assailed by ADL, but believe that these personal views must be wholly irrelevant to resolution of the public interest issue presented. Second, whether that

issue is couched in terms of prohibiting specific broadcasts or of licensee responsibility, the crucial element is, in the final analysis, the effect on free speech—on the widest possible dissemination of ideas and concepts, however controversial or perhaps understandably offensive to some. Our decision in this case, while it necessarily takes into account the facts of the case, is based on policy considerations applicable overall to the broadcast field, and is designed to promote the public interest *generally*. On an issue of this nature, it is imperative that we take into account the broad consequences of our ruling, rather than view the matter on an isolated basis.

4. ADL seeks the termination of certain broadcasts. Initially, it sought this result directly (i.e., through Commission prohibition). In its present petition, ADL seeks the same end through the device of imposing upon the licensee the responsibility to investigate and verify the correctness of the material broadcast—a process which in its view would result in rejection of the material. We appreciate ADL's position, but as stated in our prior decision, there is an overriding policy consideration—one which underlies recent Court rulings in this sensitive field and has been stressed by the Commission in its rulings. The approach advocated by ADL would entail a serious and substantial restraint on free speech. It would impose upon the licensee verification requirements which in our judgment could significantly inhibit the presentation of controversial issue programming. In *Smith* v. *California,* 361 U.S. 147, 153-55 (1959), the Supreme Court noted that a "bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." In the recent case, *Washington Post Co.* v. *Keogh,* —— F.2d —— (C.A.D.C., July 28, 1966), *cert. denied* (Jan. 9, 1967) 35 LW 3234, the Court stated:

> "Verification of syndicated news reports and columns is a time-consuming process, a factor especially sig-

> nificant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material. The costliness of this process would especially deter less established publishers from taking chances . . ."

The Court, after noting that ". . . the stake . . . is free debate . . .", stated:

> "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' *Smith* v. *California.*"

These policy considerations are equally applicable here, if not more so. Faced with possible harassment which includes loss of license at renewal, licensees, under the verification approach urged by ADL, might well tend to avoid presentation of controversial issue programming. This would be especially true of the smaller broadcast outlet, where the cost and time consumed in the verification proc-

ess would constitute a considerable deterrent. Thus, were we to follow this course, we would be significantly inhibiting debate on controversial issues and at the least rendering such debate "less robust and less wide-open." But our holdings, from the *Editorializing Report*, 13 F.C.C. 1246, 1947-48 (1948) to the recent *Pacifica* decision (36 F.C.C. 147, 149 (1963)), have sought to promote the opposite—the fullest possible robust debate on public issues. There has been no showing of consequences adverse to the public interest which would lead us to act against that fundamental and all-important policy objective. In short, faced with the arguments and considerations advanced by ADL, we choose to adhere to the basic policy determination set forth in our prior opinion to maximize the opportunity for free discussion of ideas and concepts on broadcast media. We point out that serious constitutional questions would be raised by any contrary course.

5. As an integral part of Commission's policy, we reiterate the importance of the Fairness Doctrine in matters like this. That doctrine requires the licensee to afford a reasonable opportunity for the presentation of conflicting viewpoints on issues of public importance, which he chooses to cover. It is clearly essential to insure "the maintenance of radio and television as a medium of free speech and freedom of expression for the people of the nation as a whole. (Editorialization Report, 13 F.C.C. 1246, 1248)."[1]

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[1] We noted that KTYM had not complied fully with the requirements of the Fairness Doctrine as to the October 7, 1964 broadcast. The record before us indicated only this one isolated failure, and therefore did not warrant further action. So that there will be no doubt on this score, and in disposition of the pleading submitted tardily in this matter by the ACLU, we herewith stress to this licensee the requirement that he fully familiarize himself with the doctrine, as enunciated in the Editorializing Report, and with the rulings set forth in our Fairness Primer, 29 F.R. 10415-27. Other aspects of the ACLU pleading would appear to be more appropriately considered in the context of possible overall future revision of the doctrine.

6. After the issues raised in the Petition for Reconsideration had been given the most thorough and painstaking consideration by the Commission and the present opinion prepared and presented to the Commission for action, a letter from counsel for ADL was served on the Commission on January 4, 1967, charging "a recent serious infraction by KTYM of the Personal Attack Doctrine," and requesting the Commission to withhold action until ADL should be able to file supporting details and evidence in a supplement to its petition. In view of the posture of the case, the Commission ordered that any further material ADL desired to submit on this matter be filed by January 10, 1967 and that KTYM file any response it desired to make by January 13, 1967. ADL filed a Supplement to Petition for Reconsideration, alleging, in substance that on December 28, 1966, KTYM broadcast a sponsored 15 minute commentary which contained a personal attack on the Institute for American Democracy and certain of its officials, none of whom were advised in advance of the proposed broadcast or furnished with a transcript. In reply KTYM states that it sent a notification by airmail to five officials of the Institute for American Democracy two days in advance of the actual broadcast, and it submits photostatic copies of the five notifications. KTYM makes other allegations in its own defense, and claims that it is being falsely charged with anti-Semitism and unreasonably harassed in order to suppress the broadcast of conservative commentary. The American Jewish Committee has belatedly filed a statement in support of the ADL position; and an agent of the sponsor has provided a text of the December 28th broadcast. Finally, the ADL filed a response, stating that the notices alleged to have been sent by the KTYM on December 26th were not received, and that this presents a factual matter to be resolved at a hearing.

7. This proceeding involves a license that was renewed as of December 1, 1965, in a decision issued by the Com-

mission on June 17, 1966. 4 FCC 2d 190. The broadcasts previously complained of occurred in October, 1964 and May, 1965. Clearly, in these circumstances at some point there should be a termination of the present license renewal question, and consideration of new matters in connection with a new license period. However, in view of the sensitive nature of the issues involved, we wished to avoid any possibility of uninformed action and accordingly sought the statements that have now been filed. The Commission has thus granted leave for the filing of the Supplement to the Petition for Reconsideration and the response of KTYM, pursuant to the provisions of Rule 1.106 (f), although it has neither been asked to grant nor granted leave to file supplementary statements which are merely argumentative.

8. From the statements filed with us pursuant to order, it appears that KTYM has assigned two regular staff members to audition programs such as this as far prior to broadcast as possible, in order to spot "controversial matter" and to follow a notification process, whereby a specific form is filled out and mailed to the persons attacked. The form notifies the person of the controversial broadcast, its exact time of presentation, and states (i) that if the person wishes to reply, the station offers the use of its facilities on a date and time to be determined, and (ii) that further information and recordings of the broadcast can be obtained from the station (giving the station address and phone number). KTYM asserts that this procedure was followed in the case of the December 28th broadcast, and attaches copies of the five forms sent to the persons attacked at the Washington, D. C. address of the organization involved and the affidavit of the secretary who mailed the notifications. We have noted the reply of ADL that after search of both memory and files, no notification can be said to have been received. We do not know what the final explanation of this is—whether the notifications were misaddressed or inadvertently disposed of by

someone at the addressee's office, or some other explanation. But it is undisputed that KTYM follows a monitoring and notification procedure, in order to be able to comply with the requirements of the fairness doctrine. From the standpoint of whether to delay this already too long drawn out renewal proceeding, we think that this consideration is decisive. In short, this licensee does seek to act in good faith to notify persons attacked. Consequently we believe that the proceeding involving the December 1, 1965 license renewal should not be further protracted, and that our reconsideration of the June 17, 1966 decision herein should now be decided and terminated. However, we note that this does not mean we have concluded our consideration of the complaint involving the December 28, 1966 broadcast. We will make whatever further investigation is necessary or appropriate to ascertain, if possible, the explanation for this matter. We believe that as stated, in all likelihood there is a good faith explanation. But we point out that should there be a development not now indicated by the materials before us, we shall take whatever action may be appropriate in the event that we should determine that there has been any abuse of process or failure to comply with Commission policy.

9. Accordingly, It Is Ordered, this 18th day of January, 1967, That the petition for reconsideration filed by ADL Is Denied.

Federal Communications Commission*

Ben F. Waple
Secretary

Released: January 19, 1967

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* See attached statements of Commissioners Cox and Loevinger.

Dissenting Statement of Commissioner Kenneth A. Cox

I dissent. I have already set out at length my difference with the majority in my prior opinion (see 4 FCC 2d 190, at pp. 192-216), and will not repeat that discussion here. However, I believe it desirable to point up again the essential facts and issue, for that issue is the most important one arising out of the Communications Act and the whole Congressional scheme of licensing radio stations under a public interest standard. See *NBC* v. *U.S.*, 319 U.S. 190. Make no mistake. The majority here has turned its back on the fundamental notion of licensee responsibility to operate in the public interest. And it has done so in the name of free speech in a context where the Supreme Court has made clear, again and again in recent decisions, that public policy calls for responsibility, not the abdication of such responsibility here sanctioned by the majority.

The facts. The licensee presented a series of programs by a commentator which contained apparently defamatory material (e.g., attacking an individual as a member of a Communist spy ring and Jews generally as Marxists). After the first program, complaint was made by the ADL—and further complaint was made subsequent to the other programs—that allegations of fact made by the commentator were false, with no basis in the "record" citations made by the commentator. The licensee said in his response to these complaints that he was in no position to judge the accuracy of the many statements broadcast over his station and "could not set himself up as a censor". His response was, and is, that he will not check on the accuracy of allegedly defamatory statements, even where complaint is made, but rather will simply make time available for a reply. In short, this licensee has not exercised, and does not propose to exercise, any responsibility with respect to the broadcast over his station of material which would appear to defame individuals and groups, even where substantial complaint is made as the accuracy of the de-

famatory charges. Rather, he proposes to continue his pattern of simply presenting such material, with an opportunity to those attacked to respond—if they request it.[1]

Such a pattern of operation is a patent abdication of responsibility for the use of the station. The licensee is not a common carrier (Section 3(h)). He is fully responsible for the material broadcast over his station and, where there is substantial complaint that a pattern of broadcasts over his station contains false material defaming individuals or groups, the public interest requires that he make reasonable investigation and not be indifferent about the matter. When the majority absolves the licensee of this requirement, it is turning its back on the very foundation of the Congressional scheme—the selection of qualified licensees and the imposition upon them of the responsibility for operating their stations in the public interest.[2]

The majority does this, it says, in order to promote free speech. The best answer to this argument, I believe, is found in the recent Supreme Court decisions in this field. It is not just that these cases clearly establish that the First Amendment does not preclude Commission consideration of the question of licensee responsibility. More important, I read these cases as setting forth First Amendment policy considerations which call for Commission consideration at renewal time of a reckless pattern of operation, in which the licensee refuses to examine syndicated matter prepared by others and carried on his station, no matter how patent the defamation and how strong the indication or demonstration that the material is false.

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[1] The licensee did finally investigate the charges, but only in order to file a reply pleading in 1966, years after the broadcasts in question. Even that investigation was inadequate, for the reasons set out in my dissent (4 FCC 2d 200-202).

[2] The Supreme Court has made clear that such a licensing scheme is perfectly valid with respect to radio, because the latter is inherently not open to all. *NBC* v. *U.S.*, 319 U.S. 190, 226-27.

New York Times v. *Sullivan*, 376 U.S. 254, and *Garrison* v. *Louisiana*, 379 U.S. 64, establish a malice test in cases of defamation involving public officials.[3] See also *Time, Inc.* v. *Hill*, — U.S. —, decided January 9, 1967. That is, while the First Amendment protects the maker of false charges against such officials if he acted without malice, it permits the imposition of liability for malicious defamation. It is important to bear in mind what "malice" means in this context. As defined by the Supreme Court, it means that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not," (*N. Y. Times* v. *Sullivan*, 376 U.S. at 279-80). That test permits great latitude of speech in order to encourage free discussion of the government. It does not, however, wipe out liability even in that field. Application of that test here indicates a situation clearly not protected by the First Amendment. The licensee of KTYM proposes to present defamatory material, even though there is a substantial complaint about it, without investigation and without regard to whether it is false. In short, he is indifferent to whether his station is used for knowingly false statements or false statements made with reckless disregard of the truth, with respect to both individuals and groups. He is himself thus in the same position as the commentator whose programs he broadcast. The Supreme Court pointed up in *Garrison* v. *Louisiana*

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[3] The First Amendment does not preclude imposition of liability in any defamation suits not involving public officials. However, there is every indication that the term "public official" will be given wide scope to include any person who is a "participant in public debate on issue of grave public concern" (Friendly, J., concurring in *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (C.A. 2); see also *Rosenblatt* v. *Baer*, 383 U.S. 75; *Afro-American* v. *Jaffe*, Case No. 18,363, decided August 23, 1966 (C.A.D.C.); *Pauling* v. *Globe-Democrat Publishing Co.*, 35 L.W. 2010 (C.A. 8).

why such statements do not enjoy constitutional protection (379 U.S. at 75):

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantel of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

In short, because of public policy, damage suits involving thousands of dollars can be brought in case of calculated or reckless falsehoods, even though such suits obviously inhibit speech or publication concerning public officials. Clearly, the same public policy permits—and indeed, I

believe, calls for—Commission consideration at renewal of a pattern of licensee operation involving a refusal to look at material which apparently involves calculated or reckless falsehood directed against persons or groups.

Let me stress what is *not* involved in this case. First, there is no question raised about merely erroneous statements. As the Court in *Garrison* stated (at p. 74):

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . .," 376 U.S., at 271-272, only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.

I also made clear in my dissent that I recognize the need for reasonable discretion on the part of the licensee, and that he cannot be expected to check the accuracy of every statement before it is made over his facilities. See, e.g., 4 FCC 2d at p. 197. This is also the thrust of cases such as *Smith* v. *California*, 361 U.S. 147, and *Washington Post Co.* v. *Keogh*, — F. 2d — (C.A.D.C.) decided July 28, 1966, *cert. denied*, 35 Law Week 3534. Thus, in the *Washington Post* case involving a Drew Pearson column, the Court of Appeals noted the burden which would be imposed if verification were required in every instance, stating that "a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech." But in every case, from *New York Times* to *Washington Post* to the most recent case of *Time, Inc.* v. *Hill*, the Courts have made clear that the newspaper or other person in question

could not be indifferent to the question of the truth or falsity of the statements published. Here, the licensee, by reason of the substantial ADL complaint, was unquestionably given "good reason to suspect falsity"—yet he said, "Who am I to censor? I'll give you time to reply". That pattern of operation constitutes "reckless disregard of truth."[4] And that *is* KTYM's announced pattern of operation. There is not one word in the record to suggest any change in the licensee's manner of operation in the future.

The majority relies heavily upon the applicability of the Fairness Doctrine. But surely this is an inadequate answer to "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective tool . . .". The public interest requires the *elimination*, to the extent possible, of the "known lie as a tool" because it is "at odds with the premises of democratic government . . .". *Garrison* v. *Louisiana*, *supra*. Further, I would point out that in any event the Fairness Doctrine falls short of being an effective answer to the technique of the "Big Lie." Even assuming that the licensee discharges his responsibility under the Doctrine (and, significantly, he did not do so here), there may well be no reply forthcoming precisely because deliberate or reckless falsehood *is* involved. The position of the ADL and of the American Jewish Committee is not an irrational or atypical one. One can understand why the organizations do not wish to dignify or "build up" attacks such as these, by seeming to

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[4] To make an analogy to the newspaper field, it is as if the "Washington Post" were running a Drew Pearson series, received a substantial complaint that the series contained defamatory material with no basis in the record cited, and responded, "Who are we, the Post, to judge? We'll let you have space next to Pearson's column to reply." Such a pattern of operation would clearly fall within the category, "reckless disregard of the truth," and under the Supreme Court's decisions, the newspaper would have no First Amendment defense in a libel suit.

treat them seriously and answering them on the merits.[5] But if for practical reasons there is to be no answer to the "Big Lie" (e.g., "Jews are Marxists"), the Fairness Doctrine correspondingly does not constitute a practical answer to the serious policy question of permitting, as the

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[5] I think the matter was very well stated by counsel for the Office of Communication of the United Church of Christ in a letter dated January 13, 1967 supporting the ADL's petition for reconsideration. He said:

> "In conformity with the public interest, we consider that a station which has received notice that its facilities are being used for false attacks on a racial or religious group has a responsibility to see that the other side of the case is adequately stated. The refusal of the Anti-Defamation League to dignify the slanders by giving an official 'Jewish' answer does not free the station of responsibility for counteracting the falsehoods which it has transmitted over publicly owned airwaves. Fair presentation of both sides of a controversial issue is the responsibility of the Station, which it cannot shift to anyone else."

It is clear that the licensee of KTYM has done nothing to see that the other side of the case was adequately stated except to offer the ADL—after protest—time to reply—which he soon found they would reject. In the Report adopting the Fairness doctrine (*Editorializing by Broadcast Licensees;* 13 F.C.C. 1246) the Commission said in Paragraph 9:

> We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presenta-

majority has done, the practice of disseminating deliberate or reckless falsehood in the broadcast field. And finally, it is relevant, I think, to point out that the audience which would hear any reply would differ significantly from that which heard the deliberate or reckless falsehood. While we consider this factor to be far outweighed in the ordinary case by the clear desirability of promoting the fullest discussion of controversial issues, I question whether it is outweighed in this situation where the initial presentation is a deliberate or reckless falsehood, and therefore greater care is obviously called for because of the possible damage to our democratic society through "Big Lie" techniques.

In sum, the entire scheme of the Act, and the Commission's capacity to administer the Act, rest upon licensee responsibility—the licensee's responsibility to maintain full control, in the interest of the public, of the use made of the station. The majority has abandoned that concept in this case. I think the discussion above demonstrates that there is no constitutional stricture which calls for its abandonment. On the contrary, the Supreme Court has made it clear that strong public policy militates in favor of Commission consideration at renewal of a pattern of presenting broadcasts containing calculated or reckless defamatory material. A group of responsible licensees given tremendous power over the practical right of speech of 180 million Americans is one thing. A group of irresponsible licensees would be a totally different thing. The Commission today has fostered a situation wholly at odds with

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tion of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

Certainly this licensee has not played "a conscious and positive role in bringing about balanced presentation of the opposing viewpoints." There is no claim that the audience of KTYM has, in fact, ever been given any views opposing those of Richard Cotten on this issue.

every intendment of Congress, and one in no wise required by any valid concept of free speech.

Finally, I wish to comment on the majority's resolution of the complaint concerning the December 28, 1966 broadcast upon the *assumption* that there is a good faith explanation. Perhaps there is. But this is a matter which, in the circumstances obtaining here, can be resolved only by an evidentiary hearing. It should not be sloughed aside on the basis of a mere assumption in view of the crucial importance of the majority's holding that this licensee, who has already been found to have operated in violation of the Fairness Doctrine, must comply with the Doctrine. Indeed, I would stress that even assuming KTYM's explanation to be true, there has been a failure to comply with the requirements of the personal attack principle, since KTYM does not send a copy of the attack (or a summary thereof) as our policy requires—and as the Commission's letter of June 17, 1966 advised this licensee. This is not technical quibbling. A cryptic notification such as was allegedly sent by KTYM simply says that a "controversal program" will be broadcast and thus does not notify the person of the most crucial aspects of the matter —that a personal attack upon the individual will be made and what the nature of that attack is. The most likely reaction to an obscure notification such as that allegedly used by KTYM would be puzzlement, with little incentive to pursue the matter further. So once again the majority is in a position of ignoring or excusing a clear violation of our policy. I would therefore agree with the ACLU and others that a hearing is called for on this licensee's record of compliance with the *affirmative* obligations of the Fairness Doctrine, quite apart from its more basic lack of qualifications to hold a broadcast license.

Concurring Opinion of Commissioner Lee Loevinger (On Reconsideration of Complaint Against KTYM)

I concur fully in the Opinion and Order of the Commission herein but believe that some further comments are warranted to illuminate the basic issues and emphasize the basic principles involved.

First it should be noted that this proceeding involves the renewal of a license as of December 1, 1965. Renewal was opposed by a complaint filed in October, 1965 on the basis of broadcasts which occurred in October, 1964 and May, 1965. The Commission decision was rendered in June, 1966. 4 FCC2d 190. Complainant filed a petition for reconsideration within 30 days thereafter, but has sought to bolster that petition by supplemental allegations filed six months later relating to a broadcast occurring on December 28, 1966. These, in turn, have been supported by belated filings from other parties.

Since June, 1966 the Commission and individual Commissioners have been engaged in research, analysis and discussion of the issues presented in this proceeding. It is perhaps only coincidence, but the supplemental allegations of complainant were delivered to the Commission by hand on the morning that the Commission met to vote on a proposed disposition of the proceeding. Thus the Commission was presented with a wholly new controversy, apparently demanding investigation, literally at the very last minute.

Both the statute and the rules impose a 30 day limit on the filing of petitions for reconsideration. 47 USC sec. 405; 47 CFR sec. 1.106(f). Further, the rules specify the Commission will not consider any supplement or addition to a petition for reconsideration, filed more than 30 days after the action sought to be reconsidered, except upon special leave granted on appropriate grounds. No such leave was sought here.

I think it is plain from the statute and rules, as well as Commission precedent and general legal principles, that reconsideration was not intended and cannot properly be used to suspend Commission decisions in uncertainty for protracted and indefinite periods. Yet that is precisely the effect that follows, and is obviously sought, by the actions of complainant here. If the Commission should defer decision of reconsideration of the December 1, 1965, renewal until investigation of the most recent incident is completed, there is nothing to prevent the complainant from filing another supplement based on some more recent incident as the Commission again nears a time of decision. Thus by continuous supplements to a petition for reconsideration, a complainant could invoke the necessity of continuing investigation and prevent a decision strongly objected to from ever becoming final.

Complainant will, of course, respond that a licensee should avoid giving occasion for complaint. However it is inconceivable that a broadcast licensee could wholly avoid providing grounds for at least colorable complaint by a diligent and ingenious lawyer charged to find such grounds, except by total surrender to all demands and complete acceptance of the viewpoint of those who would complain.

It seems clear to me that the time limit on filing petitions for reconsideration implies that events occurring after expiration of that time limit are to be the subject of fresh proceedings, and not the occasion for protracting and unsettling previously decided controversies. This is particularly necessary where the after-occurring events are, as here, matters which themselves seem to call for investigation and consideration with respect to their own peculiar facts. The Commission has ample authority to take any action that may be appropriate with respect to complaints against broadcast licensees without initiating a new means for indefinite prolongation of its already slow

and protracted proceedings. Relitigation of decided cases by the device of reconsideration is a practice already far too common in Commission proceedings. It should not be encouraged and we should clearly announce and adhere to the rule that after-occurring events may be made the subject of fresh proceedings but are not a grounds for prolonging and supplementing reconsideration of a prior decision, except in the most compelling circumstances and upon full and deliberate decision by the Commission.

The basic substantive issue presented by this proceeding is defined by the statement of complainant in its Petition for Reconsideration:

> "It is ADL's position that appeals to racial or religious prejudice, like Communist propaganda or hard-core obscenity, is [sic] so fundamentally inconsistent with the public interest, convenience and necessity, that it cannot and should not claim a right to be carried on the air."

This position is emphasized in complainant's conclusion that: "The licensee must be able to show that each program he broadcasts is consistent with and promotes the public interest," and, of course, the Commission must ultimately judge what is in "the public interest."

The Petition for Reconsideration states that complainant rejected the licensee's offer of time to reply to the broadcasts complained of "because ADL does not consider that the use of a radio station's facilities to disseminate anti-Semitic falsehood can be justified or adequately countered by affirmative programming." Thus the position taken by ADL is that it is immaterial whether a licensee presents diverse and conflicting views on subjects that may be said to involve racial or religious prejudice, since certain categories of comment should be entirely proscribed.

Incidentally, it should be noted that this issue neither requires nor presents the occasion for an evidentiary hear-

ing, and that the complaint concerning the December 28th broadcast has little in common with this position. This contention of ADL does, however, raise a fundamental issue that deserves confrontation, consideration and direct determination.

The Supreme Court has never squarely held that broadcasting is within the First Amendment; but it has stated that First Amendment principles apply to all media of expression, *Lovell* v. *City of Griffin*, 303 US 444, 452 (1938), and has said: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *U. S.* v. *Paramount Pictures*, 334 US 131, 166 (1948). In *Burstyn* v. *Wilson*, 343 US 495 (1952) the Court held that motion pictures are within the First Amendment on the basis of a rationale that clearly would include broadcasting. Discussing an argument often made with respect to broadcasting, the Court said:

> "It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here. For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." 343 US 502.

With respect to broadcasting, it seems to me that the Fairness Doctrine, properly construed, see my separate opinion in *George E. Borst, et al.*, 4 RR2d 697 (1965), may

be such "community control" as the alleged "capacity for evil" of the medium warrants, but the prohibition of specified views or arguments is, in plain language, censorship and constitutionally forbidden. This view is in accord with the dicta of the Supreme Court, which has said:

> "The term 'censorship', however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material. * * * Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any censorship over radio communication." *Farmers E. & C. Union* v. *WDAY*, 360 US 525, 527, 529-30 (1959).

The fact that some views may be regarded as "appeals to religious prejudice" and be highly objectionable to those who are attacked does not justify suppression of such views. This has been stated and reiterated often and emphatically by the Supreme Court. These are a few relevant and representative expressions:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed.* v. *Barnette*, 319 US 624, 641 (1943).

> "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effect as

it presses for acceptance of an idea." *Terminiello* v. *Chicago,* 337 US 1, 4 (1949).

"Speech may be fought with speech. Falsehoods and fallacies may be exposed, not suppressed, unless there is insufficient time to avert the evil consequences of noxious doctrine by argument and education." *American Communications Assn.* v. *Doud,* 339 US 382, 396 (1940).

"The state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Burstyn* v. *Wilson,* 343 US 495, 505 (1952).

The argument that appeals to racial or religious prejudice should be treated like hard-core obscenity runs head-on into several insuperable objections. To begin with, the Supreme Court has established that there are only a few well-defined and narrowly limited classes of speech which may constitutionally be prevented or punished. These have been said to be the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. *Chaplinsky* v. *New Hampshire,* 315 US 568, 571-572 (1942). The furthest the Court has ever gone in permitting a limitation on freedom of utterance has been to sustain a state statute punishing "group libel," defined as the attribution of depravity, criminality, unchastity or lack of virtue to a race, religion or group. *Beauharnais* v. *Illinois,* 343 US 250 (1952). Incidentally, this was a narrow decision with forceful dissents from four justices who have been among the staunchest supporters of free speech and civil liberties. In any event, even *Beauharnais* requires a clear definition in advance of the proscribed kind of speech and a legisla-

tive finding of required policy. Nothing in *Beauharnais* suggests that as vague a proscription as "appeals to racial or religious prejudice" would be constitutional or that an administrative agency is authorized to institute such a rule. On the contrary, the decisions point to the conclusion that adoption of such a rule by the FCC would be stricken down as unconstitutionally vague, *Ashton* v. *Kentucky,* 384 US 195 (1966); *Cantwell* v. *Connecticut,* 310 US 296 (1940), and beyond the scope of administrative authority. *F. C. C.* v. *American Broadcasting Co.,* 347 US 284 (1954); *Bridges* v. *California,* 314 US 252 (1940).

Furthermore, such a rule or standard would be wholly unworkable. Much of religious dogma is regarded by those who reject it as no more than an appeal to prejudice and based on rank falsehood. Most religions preach that the doctrines of other religions are false, and perhaps even sinful. Until relatively recently part of the mass of the Roman Catholic Church was regarded by many Jews as anti-Semitic. On the other hand, the Roman Catholics have been the object of the most vigorous denunciation by the adherents of some Protestant sects. For the FCC to promulgate rules regarding permissible and impermissible speech relating to religion would be not only an egregious interference with free speech in broadcasting, but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment. Lee Loevinger, Religious Liberty and Broadcasting, 9 J. of Broadcasting 3 (1965), 33 Geo. Wash. L. R. 631 (1965).

It is not only impractical—and impossible in any ultimate sense—to separate an appeal to prejudice from an appeal to reason in this field, it is equally beyond the power or ability of authority to say what is religious or racial. There are centuries of bloody strife to prove that man cannot agree on what is or is not "religion." There is dispute among scientists today as to whether the concept

of race has any validity, and there is a measure of agreement only that views on the subject are often the product of prejudice. See M. F. Ashley Montague, Man's Most Dangerous Myth (3rd ed., 1952); Patricia McBroom, Science on Race, 91 Science News 44 (14 January 1967). In the leading contemporary scientific view, the term "racial" as used by ADL is itself the product of social prejudice.

Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of "falsehood" or an "appeal to prejudice" as officially defined. All that the government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints. Yet this would be impossible under the rule espoused by the ADL. The present case illustrates the matter. The assailed commentator here does not ostensibly attack the Jews as a religious group, but does attack Zionists and the ADL because the latter is conducting a campaign against "right wing extremists," which is said to include that commentator. But if anyone is permitted to express views favorable to Zionism or the ADL, or unfavorable to "right wing extremists" or the assailed commentator, then the Fairness Doctrine requires that someone representing the contrary viewpoints be given the opportunity to reply. This, of course, is precisely what the ADL contends cannot be permitted. If what the ADL calls "appeals to racial or religious prejudice" is to be classed with hard-core obscenity, then it has no right to be heard on the air, and the only views which are entitled to be broadcast on matters of concern to the ADL are those which the ADL holds or finds acceptable. This is irreconcilable with either the Fairness Doctrine or the right of free speech.

Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from

the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. So this formulation does not advance the argument either constitutionally, ideologically or practically. Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government. *Smith* v. *California,* 361 US 147 (1959); *Bantam Books* v. *Sullivan,* 372 US 58 (1963); *Washington Post* v. *Keogh,* —— F2d —— (CA DC 1966), cert. den., 35 LW 3234 (1967).

In the recent case of *Bond* v. *Floyd,* 17 Led2d 235 (1966) the Supreme Court held that a privilege (sitting in the State legislature) could not be denied because of exercise of the constitutionally protected right of free speech. This would seem to dispose of the argument that since broadcasting is a privilege, not a right, a license to broadcast can be conditioned on a limitation of the right of free speech. In other words, it seems to me that the constitutional right of free speech extends to broadcast speech as much as to any other kind, subject only to the qualification that the characteristics of the medium may present "peculiar problems" that involve slightly different applications of the principle than other media with other characteristics. See *Burstyn* v. *Wilson,* 343 US 495, 502-503 (1952). For example, it is not an unconstitutional denial of free speech to forbid communication by radio except over licensed facilities operated in accordance with prescribed technical standards. *NBC* v. *U. S.,* 319 US 190, 226 (1943). On the other hand, broadcast speech may be free of some limitations imposed by particular social situations. The cry of "Fire," which can properly be prohibited in a

crowded theatre, carries little danger when brought into the home by radio or television where it is easily recognized as mere drama. While broadcasting may be subject to standards of obscenity appropriate to the drawing room, rather than to those of the clinic or theatre, speech which might present a clear and present danger of riot when uttered to a crowd on the street or in a park may present no such danger when delivered to the dispersed audience of a broadcast.

Of course there is grave danger in allowing any views, including those which we abhor, to be uttered freely, especially on a medium as far-reaching and wide-ranging as broadcasting. Fear of this danger must be very acute today when we contemplate the excesses and horrors of recent authoritarian governments and the strident irrationality of the radical extremes of right and left. No one who has held a position such as member of the FCC can be insensitive or indifferent to the outrage and the anguish that are caused by personal attacks, which are so often misinformed and unfair. But such dangers have existed in every country and every era. The most rigorous efforts of the most ruthless tyrants to suppress dangerous doctrines and personal attacks have only cast a glow of martyrdom on the dissidents. Freedom is a bold and dangerous experiment. The principle that any man is at liberty to preach any doctrine, no matter how radical or objectionable to others, is perhaps the most dangerous of all doctrines. But we are committed to unqualified acceptance of this doctrine and its dangers—and so far the principle of free speech has worked better than any conceivable alternative. We cannot avoid all dangers in our social and political course; we can only choose the course which best serves and least threatens our values and ideals. For Americans that course clearly lies in unqualified acceptance of First Amendment freedoms. Any rule which would directly or indirectly establish a test of content for views

which are entitled to be spoken or heard through the broadcasting media is inconsistent with the First Amendment. Free speech is deaf to doctrine, indifferent to dogma, and without political preference. Our practice does not always achieve this ideal, but this is the principle that must always guide us.

APPENDIX VI

Constitutional and Statutory Provisions Involved

(1) The First Amendment to the Constitution provides as follows in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

(2) The relevant sections of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064 *et seq.*), as amended, read as follows in pertinent part:

Section 307(d), 47 U.S.C. § 307(d):

> "Upon the expiration of any license, upon application therefor, a renewal of such license may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby."

Section 308(a), 47 U.S.C. § 308(a):

> "The Commission may grant . . . station licenses, . . . or renewals thereof, only upon written application therefor received by it. . . ."

Section 309, 47 U.S.C. § 309:

> "(a) Subject to the provisions of this section the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and

necessity will be served by the granting of such application. . . ."

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commismission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing. . . ."

Section 326, 47 U.S.C. § 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 990

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH PACIFIC SOUTHWEST REGIONAL OFFICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND TRANS AMERICA BROADCASTING CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the the court of appeals (Pet. 2a–12a) is reported at 403 F. 2d 169. The Commission's memorandum opinion (Pet. 13a–66a) is reported at 4 F.C.C. 2d 190; its memorandum opinion and order denying reconsideration (Pet. 69a–95a) is reported at 6 F.C.C. 2d 385.

JURISDICTION

The judgment of the court of appeals (Pet. 1a) was entered on September 30, 1968. The petition for a writ

335-854—69

of certiorari was filed on January 29, 1969, the time having been extended by order of Mr. Justice Black on December 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission was precluded from renewing a radio station's broadcast license without a hearing because, during the preceding three-year license term, the station had carried several syndicated anti-Semitic broadcasts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151–609) are set forth in the Appendix to the Petition (Pet. 95a–96a).

STATEMENT

In the fall of 1965, Trans America Broadcasting Corporation filed with the Federal Communications Commission an application for renewal of its license for radio broadcast station KTYM, Inglewood, California.[1] Pursuant to established Commission procedures, the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (hereafter ADL) opposed the application on grounds arising out of the fact that on several occasions during the three-year license term then ending KTYM had

[1] Inglewood is a part of the Los Angeles metropolitan area. Trans America Broadcasting Corporation, owned solely by Albert J. Williams, had been licensee of KTYM since 1958.

carried syndicated broadcasts containing anti-Semitic material.

KTYM's renewal application set forth a detailed description of the station's programming and program policies (R. 5–6, 11–32). In addition to a heavy proportion of recorded music, about 25% of KTYM's past and projected schedule was devoted to religious broadcasts representing the major denominations and another 20–30% to news, talk and discussion. One of the talk programs was a five-day-a-week 15 minute program called "Conservative Viewpoint" taped and distributed to radio stations across the country by one Richard Cotten (R. 23), who has no other connection with KTYM.

The gist of the ADL opposition (R. 39–45) was that in carrying several of the Cotten broadcasts in 1964 and 1965 the licensee knowingly disseminated anti-Semitic views and that such programs are contrary to the public interest.[2] ADL further complained that defamatory and untrue attacks on ADL and some of its officers and staff by Cotten had been broadcast, and that KTYM had failed to comply with the requirement of the Commission's Fairness Doctrine that the subjects of such attacks be promptly notified and offered response time.[3] It conceded, however, that,

[2] The text of several Cotten programs was attached to the complaint (R. 45–53, Pet. 42a-62a).

[3] In general, the Fairness Doctrine requires licensees to afford reasonable opportunities for the presentation of conflicting views on issues of public importance. One aspect of the Doctrine (codified in the Commission's rules since the events here in question) provides special licensee obligations regarding noti-

after it complained to the station, the licensee had offered an opportunity to reply which ADL declined.

In response (R. 54–83), KTYM denied that Cotten's program was *per se* unsuitable and stated that listener response had been overwhelmingly favorable. KTYM's position was that it would continue to carry the views of seemingly responsible commentators like Cotten, that to verify each of their statements would be virtually impossible, and that it would comply with the Fairness Doctrine when necessary by providing opportunities for presentation of opposing viewpoints.

On June 17, 1966, the Commission, Commissioner Cox dissenting, released its decision granting KTYM's renewal application (Pet. 13a–66a) and its related letter to KTYM (Pet. 67a–68a). The Commission's action was based upon "an overall review of KTYM's operation," including ADL's charges (Pet. 67a), as to which it considered that the facts were fully presented by the documents before it (Pet. 13a). The Commission found that with respect to one Cotten broadcast attacking ADL and its general counsel the station had violated the personal attack policy of the Fairness Doctrine by failing to give them the required notice, and it reprimanded the station for this violation (Pet. 68a). But it found that KTYM had otherwise

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fication and opportunity for response in the case of attacks upon individuals or groups in discussions of controversial public issues. The nature and history of the Doctrine are fully discussed in the Brief for the United States and the Federal Communications Commission in *Red Lion Broadcasting Co.* v. *United States* and *United States* v. *Radio Television News Directors Association*, Nos. 2 and 717, this Term.

complied with the Fairness Doctrine by offering reply time and noted its undertaking to continue to do so, and accordingly concluded that the single isolated violation should not prevent renewal (Pet. 16a, 68a).

On the broader question raised by ADL, whether Cotten's anti-Semitic broadcasts were so contrary to the public interest that a licensee who permits them should be disqualified, the Commission stated the issue to be whether the agency should "act to suppress the expression of views which it abhors or * * * require the opportunity for the expression of opposing views" (Pet. 14a). In the Commission's judgment, the latter was clearly the better course:

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views. [Pet. 15a.]

ADL then filed a petition for reconsideration (R. 395–420), in which it urged particularly that the licensee should have investigated and verified the truth

of the matter broadcast. The Commission reaffirmed its earlier action in a further elaborated opinion from which Commissioner Cox again dissented; Commissioner Loevinger concurred separately (Pet. 69a–95a). The Commission's opinion pointed out that:

> Faced with possible harassment which includes loss of license at renewal, licensees, under the verification approach urged by ADL, might well tend to avoid presentation of controversial issue programming. This would be especially true of the smaller broadcast outlet, where the cost and time consumed in the verification process would constitute a considerable deterrent. Thus, were we to follow this course, we would be significantly inhibiting debate on controversial issues and at the least rendering such debate "less robust and less wide-open." But our holdings, from the *Editorializing Report,* 13 F.C.C. 1246, 1947–48 (1948) to the recent *Pacifica* decision (36 F.C.C. 147, 149 (1963)), have sought to promote the opposite—the fullest possible robust debate on public issues. There has been no showing of consequences adverse to the public interest which would lead us to act against that fundamental and all-important policy objective. * * * [Pet. 71a–72a.]

And the Commission reiterated that:

> * * * whether [the] issue is couched in terms of prohibiting specific broadcasts or of licensee responsibility, the crucial element is, in the final analysis, the effect on free speech—on the widest possible dissemination of ideas and concepts, however controversial or perhaps understandably offensive to some. Our decision in this case, while it necessarily takes into account the facts of the case, is based on policy considerations applicable overall to the broadcast field, and is designed to promote the public interest *generally.* * * * [Pet. 69a–70a.]

ADL appealed and the court below unanimously affirmed the Commission's action (Pet. 2a–12a). Both the majority opinion and the concurring opinion of Judge Wright (Pet. 8a, 11a–12a) expressed the view that the Commission has the authority under the Communications Act to deny an application for renewal of license where a pervasive pattern of irresponsible programming is shown, but observed that the First Amendment and Section 326 of the Act require the Commission to "proceed cautiously" in this area. The court held that no hearing was required with respect to the renewal since the issues raised by ADL "turned not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts" (Pet. 5a), and further concluded that there was a substantial basis in the record for the Commission's action.

ARGUMENT

Petitioner would have this Court determine whether the First Amendment precludes the Commission from determining at renewal time whether a licensee has adequately performed his duty to serve the public interest (Pet. 3). But that question is not presented on this record, nor is there any dispute as to its answer.

The Commission's action did not depend upon any perceived First Amendment constraints. To be sure, it did observe that adoption of ADL's position would raise "serious constitutional questions" (Pet. 72a), but its decision was squarely based on "the basic policy determination * * * to maximize the opportu-

nity for free discussion of ideas and concepts on broadcast media." (*Ibid.*) Moreover, the Commission has not shown any doubt as to its power and duty to test licensee performance against the needs of the public interest. As its opinions clearly show, the Commission did so test this licensee's performance, and found it—all things considered—not inconsistent with the public interest. The court of appeals properly held that the record supported the Commission's exercise of its statutory judgment, and that there was no need for the fully developed facts before the Commission to be explored further at a hearing.

The Commission's decision is based upon the policy judgment that in the administration of the Communications Act the wisest course and the one which best serves the public interest is that which encourages, rather than inhibits, the carriage of controversial and unorthodox views. The agency quite properly concluded that a grant of the ADL complaint would have an inhibiting effect on licensees, causing them to avoid airing unorthodox views or views which might offend some members of the listening public lest their licenses be placed in jeopardy. To require a broadcaster, as a condition of his license, to delete all possibly defamatory matter and to verify the truth of all material he broadcasts would impose an unacceptable burden. Broadcasters—and especially smaller stations—must be given a reasonable amount of latitude in accepting program material from networks,

wire services and syndicated sources.[4] To be sure, consistent presentation of false material knowingly or with reckless disregard for the truth would raise serious question as to a licensee's qualifications. But that is not the situation here. The Commission found that KTYM had accepted responsibility for its broadcasts and—with the exception of the single personal attack problem—its obligation under the Fairness Doctrine to afford opportunities for the presentation of opposing views.[5]

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[4] Of course Commission action renewing a broadcast license in no way immunizes the licensee from liability under applicable state libel or defamation statutes.

[5] The evidence before the Commission showed that, after receiving a complaint from ADL, the licensee sought to arrange a meeting between himself, Cotten, and ADL to explore the differences and perhaps air them free of charge in a round-table discussion (R. 94, 157–158, 250–251); that after that meeting, the licensee wrote on occasions to Cotten requesting documentation with respect to certain matters raised by ADL (R. 103); and that the licensee regarded the controversy as so complex that "ventilation of both sides" was the best course (R. 248). KTYM auditions all the Cotten tapes, as well as others, removing whatever is adjudged unduly harsh or unwarranted (R. 425), and where appropriate notifying individuals who might wish to use the station's facilities to respond (R. 565).

ADL's complaint here was based on a few samples of a single fifteen minute program out of more than 100 hours of broadcasting weekly. Thus there is no inconsistency between this case and earlier decisions upholding Commission actions failing to renew licenses for programming deficiencies. See *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670, (C.A.D.C.), *certiorari denied*, 335 U.S. 846; *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C.), *certiorari denied*, 288 U.S. 599. Those cases, unlike this case, involved fundamentally objectionable programming which permeated and gave the dominant theme to the station's schedule.

Granting that knowing false statements and false statements made with reckless disregard of the truth are, as ADL argues (Pet. 18), constitutionally unprotected, surely it does not follow that the First Amendment *requires* the Commission to suppress unprotected speech by persons using licensees' facilities. The Commission has concluded that the public is better served by the Fairness Doctrine than it would be by imposing rigorous licensee self-consorship, and there is no warrant for this Court to question that judgment. Certainly this Court is not called upon to advise as to how far the Commission might go in imposing self-censorship if it were to change its policy.

This case bears no significant relationship to the pending cases relating to the constitutional validity of the Commission's personal attack policy and rules,[6] or to the petitions for writs of certiorari that have recently been filed attacking the application of the Fairness Doctrine to cigarette advertising.[7] Those cases concern the Commission's efforts to ensure that contrasting views will be heard, whereas petitioner here

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[6] *Red Lion Broadcasting Co.* v. *United States*, No. 2, this Term, certiorari granted, 389 U.S. 968; *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, January 13, 1969.

[7] *Banzhaf* v. *Federal Communications Commission*, C.A.D.C. No. 21,285, decided November 21, 1968, pending on petitions for certiorari *sub nom. The Tobacco Institute* v. *Federal Communications Commission*, No. 1036, this Term; *National Association of Broadcasters* v. *Federal Communications Commission*, No. 1059, this Term; *American Broadcasting Companies, Inc.* v. *Federal Communications Commission*, No. 1060, this Term; and *National Broadcasting Company, Inc.* v. *Federal Communications Commission*, No. 1067, this Term.

urges that, without regard to any right of reply, certain kinds of programming should be suppressed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969